Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT C. HORNKOHL, in his official capacity as Director of Public Safety for City of Manistee and CITY OF MANISTEE,

Petitioners,

v.

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment give a rise to a right to unhindered private rescue?

PARTIES TO THE PROCEEDING

Petitioners

Robert C. Hornkohl is an individual and not a subsidiary or affiliate of a publicly traded corporation.

The City of Manistee is a municipal corporation under the laws of Michigan, is not publicly traded, or affiliated or a subsidiary of a publicly traded corporation.

Respondent

Galen Beck, Personal Representative of the Estate of Eugene Beck, is the Respondent and not a subsidiary or affiliate of a publicly traded corporation.

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CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 17, 2000. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. § 2101 (c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Plaintiffs seek to recover for the death of Eugene Beck on the basis that the City of Manistee and Chief of Police Hornkohl hindered private rescuers from attempting to dive into the Manistee River to save Beck from drowning. Plaintiffs argue that this is arbitrary in the constitutional sense and thus violates their Fourteenth Amendment right to substantive due process.

Although the trial court rejected this theory (App. A at 42a), the Sixth Circuit Court of Appeals reversed the lower court and recognized a constitutional right to unhindered private rescue. (App. A at 8a-10a.) According to the Sixth Circuit, Plaintiffs are entitled to a constitutional cause of action on the basis of allegations that a man's life could have been saved by two volunteer divers who would have launched a timely effort to save him by diving into the Manistee River, but who were prevented by an "irrational government prohibition against private rescue attempts." (App. A at 8a.) Although the Sixth Circuit tried to limit this broad new constitutional right by suggesting that a policy inhibiting private rescue efforts would not be irrational if the private rescuers were not equipped or if the state provided a meaningful alterative rescue service, the effect of this ruling is to vastly expand substantive due process by recognizing an affirmative right to unhindered private rescue services.

When analyzing constitutional claims in the area of rescue services, federal appellate courts have adopted divergent approaches. The Seventh and Sixth Circuits have now recognized a substantive due process right to unhindered private rescue efforts while other circuits have questioned the existence of such a right. *Compare Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990) and *Beck v. Haik*, Sixth Circuit

No. 99-1050 (2000) with *Hamilton v. Cannon*, 80 F.3d 1525 (11th Cir. 1996), and *Andrews v. Wilkins*, 934 F.2d 1267 (D.C. Cir. 1991).

The City of Manistee and Chief of Police Hornkohl seek relief from this Court for the federal constitutional errors committed by the Court below.

A. Factual background.

On June 28, 1995, central dispatch received a call that someone jumped off the Memorial Bridge in Manistee into the river. (R.60 Motion by Defendants, Exhibit A, Police Department Incident Report, 4/8/98.) According to the police reports, the first call concerning the incident was made to 9-1-1 dispatch shortly after ten o'clock. (R.60 Motion by Defendants, Exhibit B, Log, 4/8/98.) According to the log, two City of Manistee police officers, Lindeman and Stuckum, arrived on the scene at 10:08 p.m. (R.60 Motion by Defendants, Exhibit B, Log.) They initially saw one person swimming in the water. (R.60 Motion by Defendants, Exhibit C, Stuckum Dep. at pp.6-7, 4/8/98,; R.60 Motion by Defendants, Exhibit D, Lindeman Dep. at pp.8-9, 4/8/98.)

That individual, Mark Sander, swam to shore and safely reached the north bank of the river, where he was arrested by Stuckum. (R.60 Motion by Defendants, Exhibit C, Stuckum Dep. at pp.6-7 4/8/98.) Lindeman became aware that a second individual might have also jumped from the bridge. (R.60 Motion by Defendants, Exhibit D, Lindeman Dep. at p.13.) He saw what he thought might be a second person in the water, further downstream. (R.60 Motion by Defendants, Exhibit D, Lindeman Dep. at pp.14-15.) Lindeman did not think the second person was alive:

> My best memory of this I wasn't sure that I did see a body. What I—if what I seen was the body, it was a body. It wasn't struggling. It was a body. (R.60 Motion by Defendants, Exhibit D, Lindeman Dep. at p.15).

Lindeman reported seeing the "subject go under and not resurface at 22:17 [10:17 p.m.]." (R.60 Motion by Defendants, Exhibit D, Lindeman Dep. at p. 14.) No one saw the body at any time after that point; from and after 10:17 p.m., the effort became an underwater rescue or recovery. At 10:17 p.m., central dispatch called the County's dive team. (R.60 Motion by Defendants, Exhibit B, Log.) This was consistent with the instructions they had been given about water emergencies and incidents. (R.60 Motion by Defendants, Exhibit E, March 2, 1995 letter by Dale Kowalkowski and the Manistee County Sheriff Department Underwater Search and Recovery Unit Policy Statement and Purpose; R.60 Motion by Defendants, Exhibit A, April 12, 1994 Memorandum to Central Dispatch/911 by Robert C. Hornkohl.)

The City's policy, the result of considerable discussion, was ultimately presented to and adopted unanimously by the City Council on March 16, 1993. (R.60 Motion by Defendants, Exhibit A, Affidavit of R. Ben Bifoss at ¶5.) City personnel responded to emergencies involving subjects visible in the water or on ice but did not provide underwater rescue services. (R.60 Motion by Defendants, Exhibit A, Affidavit of R. Ben Bifoss, City Manager, and the attachments.) The City's team would "not dive under any circumstances." (R.60 Motion by Defendants, Exhibit A, City's Cold Water Rescue Team Policy.)

The City anticipated that the Manistee County Sheriff's Department Dive Team would take over if the victim was submerged under the water or below the ice. (R. 60 Motion by Defendants, Exhibit A, City of Manistee Cold Water Rescue Team Policy.) If the County's dive team was unable to respond, the City's policy contemplated contacting members of a non-governmental volunteer entity known as the Manistee Search and Rescue Dive Team (MSRDT) to assist in the rescue or recovery effort. (R.60 Motion by Defendants, Exhibit A.) The MSRDT contracted with the City to make itself available and provide rescue and recovery services on a volunteer basis. (R.60 Motion by Defendants, Exhibit A, Contract dated August 1993.) The City was to "maintain control of any rescue scene through the Senior Public Safety Personnel on site, specifically including the sole right to determine when rescue operations commence and when operations cease." (R.60 Motion by Defendants, Exhibit A, Contract, ¶10.)

Two members of the Manistee Search & Rescue Dive Team heard the report of a possible drowning and drove to the scene. (R.109 Brief in Opposition, Exhibit O, Cole Affidavit; R.109 Brief in Opposition, Exhibit P, Mosack Dep. at p.9.) At 10:38, these divers, Cole and Mosack, told central dispatch that they were available if needed. (R.109, Brief in Opposition, Exhibit P, Mosack Dep. at p.9.) Mosack told Hornkohl that they had their equipment and were ready to go in the water. (R.109 Brief in Opposition, Exhibit P, Mosack Dep. at p.10.) Hornkohl told Mosack that the sheriff's dive team had been summoned and to stand by (R.109 Brief in Opposition, Exhibit P, Mosack Dep. at p.10). Although he could not recall who it was, Cole also remembers being told that they weren't needed. (R.60 Motion by Defendants, Exhibit K, Cole Dep. at p.22-24.)

The County's dive team was on its way by 10:33 p.m. (R.60 Motion by Defendants, Exhibit B, Log.) The sheriff arrived on the scene at approximately 11:00 p.m. (R.60 Motion by Defendants, Exhibit F, Haik Dep. at p.9.) The under-sheriff, Mr. Kowalkowski, head of the dive team, was already on the scene and in the boat pulling out from the river's bank when Sheriff Haik arrived. (R.60 Motion by Defendants, Exhibit F, Haik Dep. at p.27.) The County's team located Beck's body at about 11:19 p.m. (R.60 Motion by Defendants, Exhibit B, App. at p.143.) Mr. Beck was pronounced dead at 11:38 p.m. (R.60 Motion by Defendants, Exhibit B.)

B. Judicial proceedings.

Galen Beck, the Personal Representative of the Estate of Eugene Beck, and Sharon Beck, mother of the decedent, Eugene Beck, brought this action seeking to recover for injuries arising from Eugene Beck's death by drowning. (R.1 Complaint, ¶¶1-9.) Plaintiffs sued Sheriff Edward A. Haik, duly elected Sheriff of Manistee County and Robert C. Hornkohl, Director of Public Safety for the City of Manistee. (R.1 Complaint.)

Defendant Hornkohl filed an answer to the complaint, the thrust of which was to deny liability. (R.8 Answer to Complaint 7/21/97.) Hornkohl raised a number of affirmative defenses including failure to state a claim, absolute and qualified immunity, and immunity under Michigan's governmental tort liability statute. (R.8 Answer to Complaint, ¶¶1-18.) By stipulation, the parties agreed to allow plaintiffs to amend their complaint to name the City of Manistee and Manistee County as defendants. (R.17 Stipulation and Order 8/18/97.)

Plaintiffs later sought and received leave to amend the pleadings. (Motion by Plaintiffs, 10/17/97; Order, 11/17/97.) Plaintiffs filed an amended complaint. (R.34 Amended Complaint 12/2/97.) Plaintiffs alleged that the police were notified that someone was in the water, arrived at the scene within two minutes, and saw Beck struggling. (R.34 Amended Complaint, ¶9.) Trained and equipped non-governmental underwater rescue personnel allegedly arrived at the scene within approximately five minutes but were prohibited from rescuing Beck. (R.34 Amended Complaint, ¶9.) According to plaintiffs, the City of Manistee and Hornkohl had a written policy of providing water rescue but a custom of delaying it unless the sheriff or county authorized commencement of rescue efforts. (R.34 Amended Complaint, ¶9.) Plaintiffs complain that defendant Hornkohl told non-governmental divers that they could not enter the water. (R.34 Amended Complaint, ¶9.) Plaintiffs allege that Beck's death resulted from defendants' policies, custom, and practices. (R.34 Amended Complaint, ¶9.)

Beck was allegedly submerged in cold water and his position had purportedly been noted by reliable eye witnesses, a factor increasing the likelihood of a successful rescue. (R.34 Amended Complaint, ¶¶12-14.) According to plaintiffs, members of the Manistee Search and Rescue Dive Team arrived at the scene within a few minutes after Beck was submerged and prepared their scuba equipment to perform an immediate rescue. (R.34 Amended Complaint, ¶16.) Plaintiffs complain that the divers were prevented from entering the water to rescue Beck pursuant to an official policy of the defendants. (R.34 Amended Complaint, ¶17.) Plaintiffs allege that the MSRDT divers believed that they would be charged with a crime if they attempted to enter the water and rescue Eugene Beck. (R.34 Amended Complaint, ¶19.)

According to plaintiffs, Sharon Beck, a bystander to the incident, tried to jump into the river to save her son. (R.34 Amended Complaint.) She was allegedly physically restrained by at least one uniformed officer. (R.34 Amended Complaint, ¶23.) Plaintiffs characterize Mrs. Beck as hysterical and claim that she suffered extreme emotional trauma as she watched defendants' "inept conduct" in handling rescue efforts. (R.34 Amended Complaint, ¶24.)

In Count I, plaintiffs set forth civil rights and state law tort theories against Sheriff Haik and the County. (R.34 Amended Complaint, ¶29-36.) Plaintiffs complain that Sheriff Haik, acting with final responsibility for the county, adopted a *de facto* policy of preventing private rescues of drowning persons while failing to provide meaningful alternatives. (R.34 Amended Complaint, ¶25.) Plaintiffs complain that Eugene Beck was denied his right to be rescued by non-governmental rescuers and allege that his mother suffered serious emotional distress as the direct and proximate result of deliberate indifference and gross negligence by the on-scene officers. (R.34 Amended Complaint, ¶¶26-28.)

In Count II, plaintiffs claim that the City of Manistee and Hornkohl violated their civil rights and committed various state law torts. (R.34 Amended Complaint, ¶¶37-47.) According to plaintiffs, Hornkohl was in control of the Beck drowning scene until Haik arrived, and had a special relationship with Beck since he knew Beck faced a potentially fatal risk and the means and opportunity to help Beck were present at the scene. (R.34 Amended Complaint.) According to plaintiffs, Hornkohl personally prevented the divers from commencing a rescue operation. (R.34 Amended Complaint, ¶40.) Plaintiffs allege that the divers were suited in wet suits, stationed on the riverbank within a 150 feet or less of Beck's

last known position, and fully trained, certified, equipped, and ready. (R.34 Amended Complaint, ¶40.)

Plaintiffs allege that Hornkohl is a policymaker with respect to the City of Manistee's claimed policy of not initiating underwater rescue unless authorized by defendant Haik and Manistee County. (R.34 Amended Complaint, ¶39.) Plaintiffs complain that Hornkohl and his officers, by policy and personal action, were deliberately indifferent to the obvious risk of drowning, refused to take action to help Beck, and prevented others from taking action to rescue him. (R.34 Amended Complaint, ¶42.) According to plaintiffs, Hornkohl deliberately adopted a policy and had a custom and practice of preventing qualified underwater rescue personnel from rescuing drowning victims unless the county sheriff authorized the rescue. (R.34 Amended Complaint, ¶43.) Plaintiffs complain that Hornkohl and the city also adopted a policy of providing no meaningful alternative to forbidden private rescues by deciding not to equip the city's public safety personnel for underwater rescues and by directing city officers not to carry their own gear in city vehicles. (R.34 Amended Complaint, ¶44.)

Hornkohl and the City of Manistee allegedly proximately caused the death of Eugene Beck or at a minimum sacrificed his greater than 50% chance of survival. (R.34 Amended Complaint, ¶46.) Hornkohl and the City of Manistee also allegedly deprived Beck of his right to life without due process of law under the Fourteenth Amendment. (R.34 Amended Complaint.)

In Count III, Sharon Beck sought to recover on the basis of consortium and bystander liability theories. (R.34 Amended Complaint, ¶¶48-56.) Sharon Beck allegedly arrived at the scene as her son was in the process of drowning

and tried to jump into the river to rescue him. (R.34 Amended Complaint, ¶¶50-51.) According to plaintiffs, Sharon Beck is entitled to recover for having watched the defendants' grossly negligent and deliberately indifferent action and because defendants prevented the rescue. (R.34 Amended Complaint, ¶56.)

The City of Manistee and Hornkohl answered the amended complaint, denied liability, and raised numerous affirmative defenses. (R.39 Answer to First Amended Complaint by City of Manistee 11/24/97; R.40 Answer to First Amended Complaint by Hornkohl 12/24/97.) Thereafter, the City of Manistee and Hornkohl sought summary judgment. (R.60 Motion by Defendants 4/8/98.)

The district court granted the defendants' motion for summary judgment as to all counts. (R.188 Opinion, 12/9/98, App. B at 26a.) The district court considered but rejected plaintiffs' claims that the decedent's due process rights had been violated. In the district court's view, the crux of plaintiffs' claim is that Mosack and Cole were prevented from initiating an underwater rescue of Beck. (R.188 Opinion at p.15, App. at 37a.) But the district court ruled that the claimed due process right could not be supported under *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 109 S.Ct. 988, 103 L. Ed. 2d 249 (1989). The district court was not persuaded that the facts of this case, viewed in the light most favorable to the plaintiffs, presented a constitutional violation even if the Seventh Circuit had recognized a constitutional right to unhindered private rescue efforts in a drowning incident. (R.188 Opinion at p.20, App. at p.794.) The district court observed that neither Mosack nor Cole were prevented from going into the water. (R.188 Opinion at p.21, App. B at 39a-42a.) The district court pointed out that Mosack only had the bottom of his wetsuit on

and Cole had not yet put on a wetsuit in preparation for any potential rescue effort. (R.188 Opinion at p.20, App. B at 42a.) In the district court's view, Hornkohl reasonably could have concluded that permitting Mosack and Cole to try to dive would complicate the better equipped efforts of the sheriff's diving team or place them in jeopardy. (R.188 Opinion at p.22, App. B at 43a.) Thus, the district court concluded that Hornkohl's conduct was an objectively reasonable response rather than a violation of due process.

In addition, the district court concluded that even if the defendants' action could be construed as violating the decedent's constitutional rights, this would not have been clear to Hornkohl thus entitling him to qualified immunity. (R.188 Opinion at p.22, App. B at 43a.) The district court characterized Sharon Beck's asserted 42 U.S.C. § 1983 loss of consortium claim as derivative of the decedent's constitutional rights and thus also dismissed it. (R.188 Opinion at pp.24-25, App. B at 45a-46a.)

With respect to defendants' state law claims, the district court relied upon the Michigan governmental immunity act to conclude that summary judgment was in order. (R.188 Opinion at pp.25-27, App. B at 46a-47a.) In the district court's view, neither Haik nor Hornkohl's conduct constituted gross negligence. (R.188 Opinion p.27, App. B at 47a.) With respect to Sharon Beck's rights, the district court concluded that no constitutional violation occurred since defendant LaPointe's conduct was motivated by a concern for Sharon Beck's safety and a safety of those who might be called upon to rescue her. (R.188 Opinion pp.28-29, App. B at 48a-50a.) The defendants' conduct in preventing Sharon Beck from endangering her own life to rescue her son did not rise to the level of gross negligence. (R.188 Opinion at p.30, App. B at 50a.)

ARGUMENT

THE FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAUSE DOES NOT GIVE RISE TO AN UNHINDERED RIGHT TO PRIVATE RESCUE SERVICES.

A. Whether There Is A Right Under The Fourteenth Amendment To Unhindered Private Rescue Services Is An Important And Recurring Question Of Substantive Due Process Law On Which The Lower Courts Do Not Agree

The Sixth Circuit has ruled that a municipality maybe held liable for interfering with private rescue efforts when the facts show that the rescuer is equipped and that no state-sponsored alternative is available at a meaningful time. This ruling operates to create a cause of action whenever the facts show that state-sponsored rescue services are not immediately available and the police officers in control of the scene should have known that a private rescuer was equipped to make a viable rescue attempt. Such a ruling converts the Fourteenth Amendment into a font of tort law rather than interpreting it in the limited way in which it was intended.

B. The Lower Courts' Expanding Approaches To Substantive Due Process Warrant Review

Nothing in the language of the due process clause of the Fourteenth Amendment requires the state to protect the life, liberty, and property of its citizens against invasion by private actors. *DeShaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189, 109 S.Ct. 988, 103 L.Ed. 2d 249 (1989). The clause is phrased as a limitation on the states' power to act, rather than a guarantee of certain

minimal levels of safety and security. *Id.* Nor does the history support such an expansive reading of the constitutional text. Consistent with these principles, this Court has recognized that the due process clause generally confers no affirmative right to government aid even when it may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. Recognizing that a municipality cannot itself be held liable for the failure to rescue, the Sixth Circuit erroneously imposed a constitutional duty not to hinder private rescue services if state-sponsored services are not immediately available. As this Court has recognized, the due process clause is the Fourteenth Amendment should not be used to transform every tort committed by a state actor into a constitutional violation. *See DeShaney,* 489 U.S. at 202.

This Court has also emphasized repeatedly that the touchstone of due process is protection of the individual against arbitrary action of government. *See County of Sacramento v. Lewis,* 523 U.S. 833, 845, 118 S.Ct. 1709, 150 L. Ed. 2d 1043 (1998). But only the most egregious official conduct can be said to be arbitrary in the constitutional sense. *Collins v. City of Harker Heights, Texas,* 503 U.S. 129, 112 S.Ct. 1071. Thus, a cognizable level of executive abuse of power must shock the judicial conscience in a constitutional sense. *County of Sacramento v. Lewis,* 523 U.S. at 846, 119 S.Ct. at 1717. This Court has made clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. *County of Sacramento v. Lewis,* 118 S.Ct. at 1717. Behavior that would most probably support a substantive due process claim is conduct intended to injure in some way that is unjustifiable by any government interest. *Lewis,* 523 U.S. at 849.

It is not surprising that in the wake of *DeShaney*, *Collins*, and *Lewis*, lower courts have been called upon to consider whether particular government conduct amounted to constitutionally arbitrary affirmative action or a negligent omission. For example, in *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir.)(en banc), *cert. denied*, 516 U.S. 994, 116 S.Ct. 530, 133 L.Ed.2d 436 (1995), the court held that when the state itself creates a dangerous situation that results in injury, it is more akin to an actor directly causing the harm and thus may be actionable. *See also*, *Davis v. Fulton County*, 90 F.3d 1346, 1350-51 (8th Cir. 1996). Theories recognized by lower courts are based on a "tenuous metaphysical construct which differentiates sins of omission from commission." *White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979).

Federal appellate courts have recognized the potential of plaintiffs to escape the proper limitations of a claim under the due process clause by describing the wrongful conduct as an abuse of governmental authority rather than a constitutional failure to protect. *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389 (5th Cir. 1999). This "semantic dodge" should not be allowed to expand the scope of actionable due process or it will encompass an ever-expanding circle of conduct. *See e.g.*, *Henderson v. City of Philadelphia*, 1999 WL 482305 (E.D. Pa. 1999) (claim that officers violated substantive due process clause when they failed to prevent a mentally ill individual from jumping out of a window of his home during their efforts to involuntarily commit him to a hospital for treatment). Despite this Court's warning not to adopt an overly expansive interpretation of substantive due process, lower courts have taken affirmative arbitrary conduct theories far beyond their moorings in the text or history of the Constitution. This case offers the Court the opportunity to give needed guidance in this area.

Beck here argues that the right at issue is the right not to be injured by arbitrary conduct on the part of the government. He insists that it was not an "inept rescuer" that caused injury to Beck. *See S.S., ex rel. Jervis v.* McMullen, 186 F.3d 106 (8th Cir. 1999). Instead, Beck claims that it was constitutionally arbitrary for the government to allegedly prevent private rescuers from diving into the river in an effort to save Eugene Beck from drowning when no government rescue would reach him in time to resuscitate him. By characterizing a government decision to await the sheriff's dive team for an underwater rescue effort as an arbitrary hindrance to private rescue efforts without a meaningful state alternative, the Sixth Circuit has impermissibly expanded substantive due process.

This is particularly true in light of the district court's findings concerning the reason for not initiating underwater rescue unless authorized by the sheriff and the county. (App. B at 33a.) Hornkohl had expressed concern about such efforts because it was too dangerous. (App. B at 37a). And the sheriff had apparently refused to work with civilian divers. (App. B at 37a.) The district court found that "Hornkohl reasonably could have concluded that permitting Mosack and Cole to attempt to dive would complicate the better equipped efforts of the Sheriff's diving team or place them in jeopardy." (App. B at 42a-43a.)

But federal appellate courts have reached differing results when considering whether to recognize a due process violation on facts similar to those alleged here. In *Jackson v. City of Joliet*, 715 F.2d 1200 (7th.Cir. 1983) *cert. denied*, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984), the Court considered whether an abuse of government authority took place when an officer directed traffic away from a burning vehicle that contained accident victims. The *Jackson*

court observed that if the officer, knowing the car was occupied and wanting the occupants to be burned to death, directed traffic away from the scene in order to prevent any passing driver from saving them, he would be liable" for a violation of due process. 715 F.2d at 1202. This hypothetical was characterized as the paradigmatic example of a constitutionally arbitrary government action.

While rejecting claims for government-supplied rescue services, *Gazette v. City of Pontiac*, 41 F.3d 1061 (6th Cir. 1994), some federal courts have predicated a substantive due process violation on a state-created danger theory. In *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990), the court held that a plaintiff successfully survived summary judgment when she introduced evidence that a police officer arrested the driver of her car and then deserted her, a passenger in the car, in a high crime area in the middle of the night, where she was later sexually assaulted.

Calling off better-equipped rescuers from a different government agency did not amount to a substantive due process violation in *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992). The Fifth Circuit considered a substantive due process claim predicated on the sheriff's decision to call off a police department SWAT team and his order that they leave the premises on which the plaintiff's decedent was being held hostage. Rejecting the plaintiff's contention that the police department would have provided a better response, the court concluded that the sheriff did not abandon the victim but continued to supervise a law enforcement effort to secure her safe release. 980 F.2d at 309. As a result, no substantive due process claim was available. *See e.g.*, *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (no substantive due process claim for dispatcher's failure to send rescue services

although it was a violation of state law). Some federal appellate courts have considered but rejected a functional custody theory as a basis for imposing substantive due process liability onto a government actor who impedes or hinders private rescue efforts. In *Purdy v. Newland, 39 F.3d 1182* (6th Cir. 1994)(unpublished), for example, the Sixth Circuit rejected a claim based on police action in shooing a cluster of people away from an individual suffering a heart attack that included a nurse who might have administered CPR. There, the court reasoned that since the officer's actions bore "no causal relationship to [the victim's] helpless condition, [the victim] was not in custody . . . . " 39 F.3d at 1181.

In *Ross v. United States,* 910 F.2d 1422 (7th Cir. 1990), the Seventh Circuit held that an assistant deputy sheriff committed a constitutional tort by interfering with private rescue efforts to save a twelve-year-old child who drowned in Lake Michigan. Two civilian scuba divers were available and willing to attempt to rescue the boy, but the local deputy sheriff barred all rescue attempts, asserting that it was county policy to allow only "authorized" fire department divers to engage in rescues. The Seventh Circuit relied upon dicta from two of its earlier opinions to support its conclusion that a "reasonable police office in Deputy Johnson's position should have known that he could not use [his] authority to prevent private rescue efforts." *Id.* at 1433.

More recently, in *Hamilton v. Cannon,* 80 F.3d 1525 (11th Cir. 1996), the Eleventh Circuit concluded that no clearly-established rule of law exists as to whether an unsuccessful, negligent, or reckless rescue attempt, or interference with a bystander rescue attempt, amounted to a constitutional violation. The court dismissed the claims against the individual on qualified immunity grounds without specifically ruling that no such claim should be recognized.

In *Andrews v. Wilkins,* 934 F.2d 1267 (D.C. Cir. 1991), the court avoided deciding whether a constitutional right to unhindered private rescue exists, concluding that it did not have to reach the issue. 934 F.2d at 1271. Here officers persuaded an individual not to go in the water to rescue the plaintiff's decedent, who was face down in the water, because he had been running from the police. By the time police arrived to rescue him, it was too late. The *Andrews* court held that the police had no constitutional duty to rescue the victim. The court also announced that it was not a constitutional violation to attempt an ineffectual rescue. The *Andrews* court specifically considered the Seventh Circuit's decision and concluded that it was distinguishable. Whatever "constitutional right to unhindered private rescue efforts" Andrews may have had, the right did not preclude police efforts directed to the safety of the rescuer.

States and local governments all over the country manage and control rescue scenes. Often, they develop policies limiting the freedom of private individuals to help – out of concern for their safety and in order to ensure that they do not interfere with the professionals' efforts. On any given day, these policies may result in the failure of someone to be rescued from a burning building or from a crashed vehicle or from the middle of a lake or river where they are drowning. Remedies for such failures have traditionally been a matter of state law – often of state tort law. The Sixth Circuit's recent decision, building upon earlier federal appellate decisions, threatens to constitutionalize this entire body of activity. It will vastly expand the federal litigation arising out failed rescue attempts.

These results would be tolerable if they were mandated by a proper understanding of the due process clause. But they are not. This Court should hear this case in order to give

needed guidance to the lower courts concerning the permissible reach of due process in the context of hindering private rescue efforts. Whatever the answer, it is necessary to resolve this important question of federal constitutional law and to insure a uniform interpretation of the Fourteenth Amendment in all of the Circuits.

CONCLUSION

The Sixth Circuit Court of Appeals decision in this case conflicts with the decisions of other federal circuits and this Court. The decision is important because its resolution will determine the scope of substantive due process in the context of claims based on hindering or impeding private rescue efforts. This Court should grant a writ of certiorari in this case to decide this important issue of federal constitutional law and to bring uniformity to the lower courts.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed October 17, 2000]

No. 99-1050

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually,
Plaintiff-Appellant,

v.

SHERIFF EDWARD A. HAIK, individually and officially for Manistee County; MANISTEE COUNTY; ROBERT C. HORNKOHL, individually and officially as Director of Public Safety for City of Manistee, and CITY OF MANISTEE,
Defendants-Appellee.

Before: **NELSON** and **DAUGHTREY**, Circuit Judges, and **BERTELSMAN**, District Judge.*

DAVID A. NELSON, Circuit Judge. This is an appeal from a summary judgment for the defendants (a county and its sheriff and a city and its police chief) in a civil rights action stemming from the death of a 28-year old man who drowned in a river. According to the plaintiffs (the decedant's estate and his mother, suing in her individual capacity), the man's life could have been saved by two volunteer divers who would have launched a timely rescue attempt had they not been arbitrarily ordered, in accordance with official policy, to stay on shore pending the arrival of a county rescue team; the county team did not reach the scene until half an hour later, when it was too late to do any good. The plaintiffs contend, among other things, that application of the policy prohibiting the volunteer divers from attempting a rescue was so irrational, on the facts of this case, as to constitute a violation of the Due Process Clause of the Fourteenth Amendment.

Upon *de novo* review of the record, we conclude that the case presents genuine issues of material fact that should have forestalled the entry of summary judgment for the defendant governmental units on the plaintiffs' due process claims. We further conclude that the district court was correct in holding, as it did, that the defendant officials were entitled to qualified immunity from suit in their individual capacities. The court was likewise correct, we believe, in dismissing

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* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

certain state law tort claims. The challenged judgment will be reversed in part and affirmed in part.

I

At approximately 10:07 p.m. on June 28, 1995, two men -- Eugene Beck and Mark Sander -- jumped or fell from a bridge in Manistee, Michigan, into the Manistee River. A witness immediately called 911, and personnel from the Manistee City Police Department, the Manistee City Fire Department, and the Manistee County Sheriff's Department Dive Team were dispatched to the scene.

City police officers Duane Stuckum and William Lindeman reached the bridge two or three minutes later. The officers saw Sander swim to shore, but not Beck. At 10:17 p.m. Officer Lindeman reported by radio that he had seen the person subsequently identified as Eugene Beck "go under and not resurface." Chief Robert Hornkohl, Director of Public Safety for the City of Manistee, arrived on the scene shortly thereafter.

Gordon Cole and Mike Mosack, members of the Manistee Search and Rescue Dive Team (MSRDT), heard a report of the incident on their scanners. The MSRDT is a group of trained civilian divers that was under contract with the City of Manistee to provide rescue and recovery services in situations where the County Dive Team was unable to respond. Although the MSRDT's services had not been requested on the night in question, Mosack and Cole headed for the bridge to volunteer any assistance they might be able to provide. The two divers were at the scene, equipment in

hand, by no later than 10:38 p.m.[1]

The volunteer divers approached Chief Hornkohl, the officer in charge, and told him that they were prepared to attempt a rescue. After speaking by two-way radio with Manistee County Sheriff Edward Haik, Chief Hornkohl reportedly instructed the divers not to enter the water. This instruction was consistent with a pre-existing understanding between the city and the county to the effect that once the subject of a water-related accident was no longer visible above the surface of the water, the County Dive Team would have exclusive authority to conduct underwater rescue operations. According to the plaintiffs, Chief Hornkohl told Mosack and Cole that the County Dive Team had already been summoned and that the two volunteers should "stand by." "Per Sheriff Haik," he allegedly added, "you're not to go in the water." The plaintiffs contend that Chief Hornkohl knew or should have known that the County Dive Team would not arrive for some time.

Mosack and Cole were dissuaded from attempting a rescue, it is asserted, both by Chief Hornkohl's order and by an "arrest policy" promulgated by Sheriff Haik. Under the alleged policy, said to have been announced at several televised city council meetings, any civilian who attempted a water rescue without the sheriff's express authorization would be subject to arrest.

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[1] The plaintiffs assert that Mosack and Cole were ready to enter the water as early as 10:25 p.m.

Eugene Beck's mother, Sharon, also came to the scene that night. Having heard of her son's plight, she tried to enter the river in the hope of rescuing him herself. Fred LaPoint, a city fireman, physically restrained her from going into the water.

County Dive Team members finally reached the bridge at approximately 11:00 p.m., some 35 minutes after the point at which the plaintiffs contend volunteer divers Mosack and Cole could have been in the water searching for Eugene Beck. A boat operated by the dive team went to the area where he had last been seen, and his body was recovered at 11:19 p.m. Although cardiopulmonary resuscitation was attempted, it was unsuccessful. Evidence tendered by the plaintiffs suggests that, given the relatively low temperature of the water, the prospects for resuscitation would have been favorable if Eugene Beck had been taken out of the water within an hour of his submersion. Had the volunteer divers been permitted to proceed when they offered to, therefore, and had their retrieval efforts taken no longer than those of the County Dive Team, the plaintiffs maintain that there is a better-than-even chance that Beck would have lived.

II

The plaintiffs filed a three-count complaint in the United States District Court for the Western District of Michigan. Count I asserted state and federal claims against Sheriff Haik and Manistee County on behalf of Eugene Beck's estate; Count II asserted state and federal claims against Chief Hornkohl and the City of Manistee on behalf of the estate; and Count III asserted state and federal claims against each of the four defendants on behalf of Eugene Beck's mother. The

district court entered summary judgment in favor of the defendants on all three counts, and this appeal followed.

III

A district court order granting summary judgment is subject to *de novo* review on appeal. *United National Ins. Co. v. SST Fitness Corp.*, 182 F.3d 447, 449 (6th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence must be viewed in the light most favorable to the party opposing the motion, and all justifiable inferences are to be drawn in that party's favor. *Morales v. American Honda Motor Co. Inc.*, 71 F.3d 531, 535 (6th Cir. 1995). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Under 42 U.S.C. § 1983, a person who, acting under color of state law, subjects another to "the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution and laws" is liable to the party injured thereby. The plaintiffs in the case at bar claim violations of four discrete "rights" purportedly secured by the Constitution of the United States: (1) a substantive due process right on the part of Eugene Beck to state-provided rescue services; (2) a substantive due process right on the part of Eugene Beck to unhindered private rescue; (3) a constitutionally protected interest on the part of Eugene Beck's mother, plaintiff Sharon Beck, in saving her son's life; and (4) a constitutionally

protected right on the part of Sharon Beck to the enjoyment of her son's company and companionship. We examine each claim in turn.[2]

A. Eugene Beck's Claimed Right to State-Provided Rescue

The plaintiffs assert that Eugene Beck was deprived of a substantive due process right to state-provided rescue services. The asserted right was violated, according to the plaintiffs, when the City of Manistee established a policy of not initiating underwater rescues unless authorized by Sheriff Haik.

The problem with this is that no constitutional right to state-provided rescue services exists. The Supreme Court has expressly held that the Due Process Clause confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the

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[2] As the district court correctly pointed out, the Due Process Clause of the Fourteenth Amendment and Article 1, § 17, of the Michigan Constitution both guarantee that no state shall deprive any person of "life, liberty, or property, without due process of law." Michigan courts have held that where the federal and state constitutions contain identical or virtually identical provisions, federal law should be followed. See *People v. Stanaway*, 446 Mich. 643, 649 n.1, 521 N.W.2d 557 (1994); *Sitz v. State Police*, 443 Mich. 744, 763, 506 N.W.2d 209 (1993). The Plaintiffs' state constitutional law claims can thus survive only if the federal claims do. For this reason, the state constitutional claims will not be addressed separately.

individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989). It follows that "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, . . . the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id.* at 196-197. The district court thus acted properly in dismissing the portions of the instant complaint that were based on the asserted right to state-sponsored assistance.

B. Eugene Beck's Claimed Right to Unhindered Private Rescue

The plaintiffs also maintain that Eugene Beck was deprived of his life by an irrational government prohibition against private rescue efforts. This claim might prove to be meritorious, we believe, depending on how a jury ultimately assesses the evidence.

As noted above, the Due Process Clause of the Fourteenth Amendment prohibits a state from depriving any person of life, liberty, or property without due process of law. Although its text might suggest that the clause was intended simply to require that fair procedures be followed in any such deprivation by the state, the Supreme Court has recognized that the clause also contains a substantive component that protects against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Courts should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992), but some

constitutionaL limits do exist on the power of state governments and their political subdivisions to jeopardize human lives through implementation of arbitrary governmental policies.

Those limits were tested by a county anti-private rescue policy that allegedly contributed to the drowning of the plaintiff's decedent in *Ross v. United States,* 910 F.2d 1422 (7th Cir. 1990). In *Ross*, a case similar to this one on its facts, the defendant county was claimed to have "had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative." *Id.* at 1431. Observing that "the state cannot arbitrarily assert its power so as to cut short a person's life," *id.* at 1433, the Court of Appeals for the Seventh Circuit reversed a summary judgment that had been entered in favor of the county. Viewing the alleged facts in a light most favorable to the plaintiff, the Seventh Circuit concluded that "the plaintiff has sufficiently alleged that the county arbitrarily denied [the plaintiff's decedent] his fourteenth amendment right to life." *Id.* at 1430.

The Seventh Circuit would not quarrel, we assume, with the proposition that public safety officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, for instance, it would certainly be permissible to forbid such an attempt. It would not be irrational, similarly, to prohibit private rescue efforts when a meaningful state-sponsored alternative is available. But *Ross* holds that official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts -- and we are

constrained to agree. Where this leaves the separate defendants in the case at bar is a matter to which we turn next.

1. Manistee County

Political subdivisions of a state are "persons" for purposes of § 1983 liability. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). Such an entity may not, however, be held vicariously liable for the unlawful acts of its employees. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). Municipal liability under § 1983 depends instead on whether the plaintiff's constitutional rights have been violated as a result of a "policy" or "custom" attributable to the municipality. *Id.* "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, 436 U.S. at 694.[3]

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[3] Defendants Hornkohl and City of Manistee contend that to succeed on a § 1983 claim against a municipality, the plaintiff must also show that the policy was implemented with deliberate indifference to its known or obvious consequences. For this proposition, the defendants cite two Supreme Court cases: *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992) and *Board of County Commissioners of Bryan County Oklahoma v. Brown*, 520 U.S. 397, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). In *Collins*, however, the requirement of "deliberate indifference" merely identified "the threshold for holding a city responsible for the constitutional torts committed by its *inadequately trained agents*." 503 U.S. at 124 (emphasis added). Likewise, in *Board of County Commissioners*, a "deliberate

In the case at bar, we believe, there are genuine issues of material fact as to whether the county cost Eugene Beck his life by its supposedly arbitrary policy against private rescue efforts. The plaintiffs allege that Beck would have survived if he had been recovered from the Manistee River within an hour of 10:17 p.m., the time at which they say he failed to resurface. The plaintiffs further allege that Mosack and Cole, trained and equipped volunteer divers, were prepared to commence rescue efforts at 10:25 p.m., a mere eight minutes later.[4] According to the plaintiffs, the civilian divers were deterred from attempting a rescue because of an arrest policy promulgated by Sheriff Haik, a policy-making official for Manistee County,[5] as well as by an order not to enter the

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indifference" requirement was imposed in the "inadequate screening" context. There is no failure-to-train or failure-to-screen claim in the case at bar, and the plaintiffs repeatedly allege in any event that the municipalities' policies, as well as their officials' actions, were indeed the result of "deliberate indifference."

[4] It is undisputed that at the very latest, Mosack and Cole could have commenced a rescue effort at 10:38 p.m., 21 minutes after Beck failed to resurface and 22 minutes before the County Dive Team arrived.

[5] Although the County invites us to rewrite Michigan law in light of the Supreme Court's decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997) (holding an Alabama sheriff to be a state, not a county, policymaker), we decline the invitation. The *McMillan* decision rested on an application of Alabama law to Alabama sheriffs and explicitly warned that this inquiry would yield different results in different states: "Since it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, there is no inconsistency created by court decisions

water issued at Sheriff Haik's direction. If a jury should accept these and the plaintiffs' other allegations as true, it would be within the jury's province to hold Manistee County liable for Eugene Beck's death.

2. The City of Manistee

As with the county, the City of Manistee can be held liable under § 1983 only if Eugene Beck's constitutional rights were violated as a result of a "policy" or "custom" attributable to the municipality. Two alleged city policies are relevant. The first, a policy of not initiating underwater rescue unless authorized by Sheriff Haik, is not actionable under the Due Process Clause. As noted above, the state has no constitutional obligation to provide rescue services; its obligation goes no further than to refrain from arbitrarily thwarting private rescue efforts if no state-sponsored alternative is available.

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that declare sheriffs to be county officers in one State, and not in another." *Id.* at 795. *Cf. Franklin v. Zaruba,* 150 F.3d 682, 685 (7th Cir. 1998) (holding a county sheriff not to be a state official in Illinois); *Pembaur v. Cincinnati,* 475 U.S. 469, 483-484, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452 (1986) (holding that an Ohio county was responsible for unconstitutional actions taken pursuant to decisions made by the county prosecutor and the county sheriff because they were the "officials responsible for establishing policy with respect to the subject matter in question."). As a matter of well-settled Michigan law, Sheriff Haik's policies are those of the County. See *Rushing v. Wayne County,* 436 Mich. 247, 260; 462 N.W.2d 23 (1990); *Marchese v. Lucas,* 758 F.2d 181, 198 (6th Cir. 1985), *cert. denied,* 480 U.S. 916, 107 S. Ct. 1369, 94 L. Ed. 2d 685 (1987).

The second policy alleged by the plaintiffs, however, hits closer to the mark. The plaintiffs say that on the night in question, Chief Hornkohl, acting in his official capacity, personally prevented Mosack and Cole from commencing rescue operations within the time frame in which it would have been possible for Eugene Beck to survive. That is, Chief Hornkohl allegedly told Mosack and Cole, "I need you to stand by. Per Sheriff Haik you're not to go in the water." This statement, argue the plaintiffs, was sufficient to subject the city to liability.

To prevail on this argument, the plaintiffs must show that Chief Hornkohl's statement can be attributed to the city as official "policy." The identification of policymaking officials whose words can be said to represent official policy is a question of state law. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority. . . ." *Pembaur*, 475 U.S. at 483 (plurality opinion).

The plaintiffs contend that although the City of Manistee had, through official policy, abdicated its authority over water rescues to Sheriff Haik and the County Dive Team, control over water accident scenes remained in the hands of the city's public safety personnel. In support of this contention the plaintiffs point to several documents indicating that the senior public safety official for the City of Manistee, Chief Hornkohl, had the exclusive authority to "control the entire scene, including coordinating all rescue efforts . . . ." (Letter to Arthur Krause from City Manager R. Ben Bifoss, Rec. No. 60, J.A. 135.). As the Director of Public Safety for the City of Manistee, another document suggests, Chief

Hornkohl had "complete authority and full responsibility" for cold water rescue emergencies. (City of Manistee Cold Water Rescue Team Police & Fire, Rec. No. 60, J.A. 130).

In *Pembaur*, the Supreme Court held that "municipal liability under § 1983 attaches where - and only where - a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." 475 U.S. at 483. The plaintiffs argue that Hornkohl, utilizing his delegated authority to "control the entire scene," made just such a deliberate choice to prevent Mosack and Cole from entering the water.

The city responds that Hornkohl's actions at the scene were constrained by the official city policy abdicating control over water emergencies to the county. If Hornkohl's actions were so constrained, the argument continues, he cannot be considered a final policy-making official.

The defendants' argument misses the point. It is true that Hornkohl was required by the city's abdication policy to summon the County Dive Team once Eugene Beck failed to resurface. But the abdication policy arguably did not require that the Director of Public Safety prevent all attempts to rescue a drowning victim when the County Dive Team was more than twenty minutes away. Whether at Sheriff Haik's direction, as the plaintiffs allege, or by his own choice, it was arguably Hornkohl alone who ordered the two volunteers not to enter the water -- if such an order was in fact given.

This circuit has held that an official's discretion to act "while performing particular functions does not make a

municipal employee a final policymaker *unless the official's actions are final and unreviewable and are not constrained by the official policies of superior officers." Feliciano v. City of Cleveland,* 988 F.2d 649, 655 (6th Cir. 1993) (emphasis added). A jury could find that no official city policy existed that constrained Hornkohl's authority to prevent or not to prevent Mosack and Cole from entering the water. And there can be no doubt that for Eugene Beck, Hornkohl's actions were final and unreviewable.

The city council allegedly knew of Sheriff Haik's stance on volunteer rescue; the sheriff is said to have announced it at several city council meetings. The council could have established a policy as to when, and in what circumstances, volunteer aid should be permitted by the director of public safety. By not doing so, the city left this decision entirely in the discretion of Chief Hornkohl. He was thus the city's final policy-maker, and his orders and directions were those of the city.

3. Sheriff Haik and Chief Hornkohl

The plaintiffs also assert state and federal civil rights claims against Sheriff Haik and Chief Hornkohl in their individual capacities. The district court held that even if the actions of these defendants violated the decedent's constitutional rights, the two individuals are protected from suit under the doctrine of qualified immunity. We agree.

Qualified immunity shields government officials performing discretionary functions from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." See *Harlow v. Fitzgerald,* 457 U.S. 800, 817-818 (1982). Disputes over qualified immunity are thus analyzed in two steps: (1) has the plaintiff shown a violation of a constitutionally protected right? (2) If so, is the right so clearly established that a reasonable official would understand that his actions violate that right? See *Summar v. Bennett,* 157 F.3d 1054, 1058 (6th Cir. 1998).

For a constitutional right to be clearly established, binding precedent must exist from the Supreme Court or from within the circuit. *Id.* Decisions from other circuits can establish the law if and only if they "point unmistakably to the unconstitutionality of the conduct and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Id.*

As of 1995, when Eugene Beck lost his life, there was no binding Supreme Court or Sixth Circuit precedent establishing with particularity that actions of the sort attributed to Sheriff Haik and Chief Hornkohl were unconstitutional. The Seventh Circuit's decision in *Ross* pointed to such a conclusion, but *Ross* was not binding in Michigan -- and we have found no direct authority in the form of pre-1995 decisions of the Supreme Court or the Sixth Circuit that could fairly be said to have left no room for doubt in the minds of reasonable public officials that *Ross* would be followed in this jurisdiction. Although a claim of qualified immunity was denied in *Ross* itself, we are satisfied, *pace Ross*, that Haik and Hornkohl are entitled to qualified immunity here.

C. Sharon Beck's "Fundamental Liberty Interest" in Rescuing Her Son

Sharon Beck, on her own behalf, argues that her "fundamental liberty interest" in preserving her son's life was violated when Officer LaPoint prevented her from charging into the water in an attempt to effect a rescue. We find Mrs. Beck's arguments unpersuasive.

Officer LaPoint testified that he saw Mrs. Beck, in a hysterical state, attempting to descend the steep riverbank. Concerned for her safety, he proceeded to restrain her. The officer's conduct was unquestionably motivated by legitimate considerations involving the woman's own well-being and the safety of those who might be called upon to rescue her if her rescue attempt failed. There was no constitutional violation here. *Cf. Andrews v. Wilkins,* 290 U.S. App. D.C. 95, 934 F.2d 1267 (D.C.Cir. 1991) (holding that no constitutional violation occurred when police blocked private rescue attempts, since the police were unaware of the rescuers' level of safety training).[6]

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[6] It is worth noting that if Mrs. Beck had been the only "rescuer" on the scene that night, no abridgment of Eugene Beck's rights would have occurred. Mrs. Beck was neither trained nor equipped to effect a rescue, nor was she in a proper frame of mind to do so. In such a situation the police would certainly be justified in stopping the private rescue attempt notwithstanding the absence of any state-sponsored alternative.

D. Sharon Beck's "Consortium" Rights

The district court dismissed Sharon Beck's § 1983 claim for loss of her son's companionship on the ground that it was derivative of her son's constitutional rights. As we have reinstated the constitutional claims against the county and city, we reinstate this claim as well.

IV

We now turn to the plaintiffs' state law claims.

A. Gross Negligence

The plaintiffs charge the defendants with gross negligence for their respective roles in Eugene Beck's death. The district court dismissed these charges in their entirety, and we conclude that the court was correct in doing so.

1. Manistee County and the City of Manistee

The Michigan Governmental Tort Liability Act provides, in part, as follows: "Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); MSA 3.996(107)(1). "Governmental agency" is defined as "the state or a political subdivision." MCL 691.1401(1)(d); MSA 3.996(101)(1)(d). The definition of "political subdivision" includes both cities and counties. MCL 691.1401(1)(b); MSA 3.996(101)(1)(b). If Manistee County and the City of Manistee were engaged in

the "exercise or discharge of a governmental function," therefore, they are immune from tort liability.

A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(1)(f); MSA 3.996(101)(1)(f). The operation of emergency rescue services is unquestionably authorized by law, so no liability can attach to either the city or the county on a state law tort claim arising from the provision of such services. See *Li v. Feldt,* 439 Mich. 457, 509 n.56, 487 N.W.2d 127, 151 (1992) (Justice Griffin, concurring in part) (including the provision of emergency services as a government function for which immunity is appropriate). The dismissal of the counts charging the governmental bodies with gross negligence will be affirmed.

2. Sheriff Haik

The Tort Liability Act provides that elected officials are immune from tort liability for injuries inflicted while acting within the scope of their authority. MCL 691.1407(5), MSA 3.996(107)(5). The position of sheriff is an elected one in Michigan. Const. 1963, art. VII § 4. The understanding between the city and the county provided Sheriff Haik with the authority to recover subjects immersed in waters within the municipalities' concurrent jurisdiction, including Manistee River. The district court thus acted properly in dismissing the state law tort charges against Sheriff Haik.

3. Chief Hornkohl

Chief Hornkohl, unlike Sheriff Haik, is not an elected official. Under Michigan law, government employees who do not hold elective office are subject to liability for acts of "gross negligence." M.C.L. 691.1407(2)(c), MSA 3.996(107)(2)(c). "Gross negligence" is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id.*

When reasonable minds can differ, the issue of "gross negligence" is for the jury. See *Jackson v. Saginaw County,* 458 Mich. 141, 146, 580 N.W.2d 870 (1998). Summary judgment is appropriate only when no reasonable juror could conclude that the defendant's actions were grossly negligent. See *Tallman v. Markstrom,* 180 Mich. App. 141; 446 N.W.2d 618 (1989).

Chief Hornkohl's decision to prevent Mosack and Cole from attempting a rescue cannot reasonably be considered conduct so reckless as to demonstrate a substantial lack of concern for Eugene Beck's well-being. The plaintiffs have offered no evidence to refute the contention that Hornkohl's actions were motivated solely by a concern for the volunteers' safety and a desire not to complicate efforts by the County Dive Team. No reasonable jury could find Hornkohl guilty of gross negligence on the facts presented by the plaintiffs here.

B. Grossly Negligent Infliction of Emotional Distress

As the district court correctly held, the conclusion that the defendants' conduct did not rise to the level of gross

negligence is dispositive of Sharon Beck's claim of grossly negligent infliction of emotional distress.

V

The judgment entered by the district court is **REVERSED** with respect to the claims against the county and city predicated on the allegedly unconstitutional interference with a rescue attempt by the two civilian divers. In all other respects the judgment is **AFFIRMED**. The case is **REMANDED** to the district court for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed December 15, 1998]

No. 1:97-CV-533

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually, *Plaintiffs*,	)
v.	)
SHERIFF EDWARD A. HAIK, individually and officially for Manistee County; MANISTEE COUNTY; ROBERT C. HORNKOHL, individually and officially as Director of Public Safety for City of Manistee, and CITY OF MANISTEE, *Defendants*	)

HON. ROBERT HOLMES BELL

AMENDED ORDER

In accordance with the opinion entered December 9, 1998,

IT IS HEREBY ORDERED that Defendants City of Manistee and Sheriff Edward A. Haik's Motion for Judgment on the Pleadings, Or in the Alternative, Summary Judgment (Dkt #122, 123) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Sheriff Edward A. Haik and Manistee County's Motion for Summary Judgment (Dkt #159-160) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants City of Manistee and Robert C. Hornkohl's Motion for Summary Judgment (Dkt #60) is **GRANTED**.

Date: December 15, 1998

/s/_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed December 9, 1998]

No. 1:97-CV-533

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually,
Plaintiffs,

v.

SHERIFF EDWARD A. HAIK, individually and officially for Manistee County; MANISTEE COUNTY; ROBERT C. HORNKOHL, individually and officially as Director of Public Safety for City of Manistee, and CITY OF MANISTEE,
Defendants

HON. ROBERT HOLMES BELL

OPINION

This action arises out of the drowning of Plaintiffs' decedent, Eugene Beck, in the Manistee River. The Plaintiffs, the Estate of Eugene Beck (the "Estate"), and his mother, Sharon Beck, in her individual capacity, brought this 42 U.S.C. § 1983 action against Edward Haik, Sheriff of Manistee County, individually and in his official capacity; Manistee County; Robert Hornkohl, Director of Public Safety for the City of Manistee, individually and in his official capacity; and the City of Manistee. Plaintiffs allege that Defendants, by official policy and individual action, intentionally interfered with and prevented bystanders from rescuing the decedent pursuant to an official policy of prohibiting private rescue of drowning victims in violation of Beck's federal and state substantive due process rights.[1] Plaintiffs also assert pendent gross negligence state law claims. In addition, Sharon Beck alleges that: (1) Defendants violated her federal and state due process rights by restraining her from trying to rescue her son; (2) she possesses a derivative loss of consortium right under § 1983;[2] and (3) she suffered emotional distress as a result of the Defendants' actions.[3] This case is before the Court on the following motions: (1) Defendants Haik and Manistee County's Motion for Judgment on the Pleadings, Or in the Alternative, Summary Judgment (Dkt #122, 123); (2) Defendants Haik and Manistee County's Motion for Summary Judgment

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[1] Amended Compl. Count I ¶ 32.

[2] Pls' Reply Br. to Hornkohl's Mtn for SJ at 14.

[3] Amended Compl. Count III ¶¶51-52.

(Haik's Mtn for SJ) (Dkt #159-160); and (3) Defendants Robert Hornkohl and City of Manistee's Motion for Summary Judgment (Hornkohl's Mtn for SJ) (Dkt #60). This Court has reviewed the briefs submitted in support of and in opposition to the Defendants' motions and has had the benefit of oral arguments held on October 2, 1998. For the reasons that follow, summary judgment is granted in favor of the Defendants.

Standard of Review

Under Rule 56 (c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). If Defendants carry their burden of showing there is an absence of evidence to support a claim then Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 253 (1986).

In determining a motion for summary judgment the court views the evidence in the light most favorable to the opposing party and draws all justifiable inferences in his favor. *Morales v. American Honda Motor Co. Inc.*, 71 F.3d 531, 535 (6th Cir. 1995). Nevertheless, the mere existence of a scintilla of evidence in support of Plaintiff's position is

not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for Plaintiff. *Id. See generally, Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989).

I

At 10:07 p.m. on June 28, 1995, Central Dispatch logged in a 911 call reporting that someone had jumped off[4] the Manistee Memorial Bridge. The Manistee City Police, Manistee City Fire Department, and the Sheriff's Department Dive Team were dispatched.[5] Manistee City police officers Duane Stuckum and William Lindeman arrived at the scene approximately 2-3 minutes later.[6] The officers parked their vehicle in the middle of the bridge, looked over the bridge and saw one person, Mark Sander, swimming in the channel.[7] Stuckum picked Sander up on the north side of the channel, west of the bridge.[8] Lindeman subsequently was informed by a witness that two individuals had gone into the river from the

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[4] Although the parties contest whether Beck fell, jumped or was pushed, the manner by which he ended up in the water is irrelevant to the disposition of the Defendants' motions.

[5] Hornkohl's Mtn for SJ, Exh. B, Central Dispatch Log.

[6] Hornkohl's Mtn for SJ, Exh. C, Stuckum Dep. at 5.

[7] Hornkohl's Mtn for SJ, Exh. D, Lindeman Dep. at 6.

[8] Hornkohl's Mtn for SJ, Exh. C, Stuckum Dep. at 7.

bridge.[9] At 10:17 p.m., Lindeman called in and advised that he saw "a subject go under and not resurface.[10]

Gordon Cole and Mike Mosack, members of the Manistee Search and Rescue Dive Team (MSRDT), heard the report of a possible drowning on their scanners and each had independently driven to the scene.[11] The MSRDT is a group of civilian divers who offer their services and who had contracted with the City of Manistee to provide rescue and recovery services if the Manistee County Sheriff's Department Dive Team was unable to respond.[12] Mosack left his friend's home and traveled to his residence to retrieve his

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[9] Hornkohl's Mtn for SJ, Exh. D, Lindeman Dep. at 13.

[10] Hornkohl's Mtn for SJ, Exh. B, Central Dispatch Log; Exh. C, Lindeman Dep. at 14.

The Court notes that the Plaintiffs' assertion that "Beck struggled on the surface for between five and one-half and seven minutes" (Pls' Reply Br. to Haik's Mtn for SJ at 4) is wholly unsupported by witnesses' accounts. William Wittig, the witness who called 911, stated in his deposition that he could not see Beck's arms or legs moving. Haik's Rebuttal Br., Dkt #172, Exh. Wittig Dep. at 43-44. Lindeman's account was that he saw a body in the river and that "[i]t wasn't struggling." Hornkohl's Mtn for SJ, Exh. D, Lindeman's Dep. at 15.

[11] Haik's Mtn for SJ, Exh. H, Mosack Dep. at 111.

[12] Hornkohl's Mtn for SJ, Exh. A, City of Manistee Cold Water Rescue Team Police and Fire.

equipment.[13] He loaded it into his vehicle and headed to the scene. Mosack's total travel route was approximately eleven miles.[14] While en route, Mosack heard Cole report to Central Dispatch that he was a member of the MSRDT and that he was on the scene, standing by.[15] It is undisputed that neither Cole, Mosack nor the MSRDT were officially summoned to the scene. At 10:38 p.m., Mosack and Cole informed Central Dispatch that they were available if needed.[16]

Mrs. Beck, upon realizing that her son was in the river, ran toward the riverbank, which was extremely steep and was restrained by Fred LaPoint, a City of Manistee fireman and a MSRDT diver.[17]

Chief Robert Hornkohl was notified of the situation and arrived on the scene.[18] Mosack, in his deposition testimony, stated that he and Cole approached Hornkohl and informed him that they were ready and willing to go into the river. Mosack recalls that Hornkohl replied that the Sheriff's Department dive team had been summoned and that they were

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[13] Haik's Mtn for SJ, Exh. H, Mosack Dep. at 113.

[14] Haik's Mtn for SJ at 8.

[15] Haik's Mtn for SJ, Exh. H, Mosack Dep. at 141.

[16] Hornkohl's Mtn for SJ, Exh. B, Central Dispatch Log.

[17] Haik's Mtn for SJ, Exh. N, LaPoint Dep. at 52.

[18] Hornkohl's Mtn for SJ, Exh. G, Hornkohl Dep. at 44.

to "stand by."[19] Cole stated in his deposition, however, that he did not remember seeing or speaking with Hornkohl that night.[20] He also stated that he cannot remember who told him that he and Mosack were not needed at the time or if Mosack was with him during this conversation.[21]

Douglas Cermack, a member of the county sheriff's diving team, and his partner, Jim Doering, heard the initial dispatch and returned to the Sheriff's Department to obtain their diving equipment.[22] In the meantime, at 10:27 p.m., a Coast Guard patrol boat, that had been notified that a citizen had overheard a police radio transmission about a person in the water, arrived on the scene.[23] By 10:33 p.m., the sheriff's dive team was en route from the Sheriff's Department to the scene.[24]

At 10:40 p.m., Haik was contacted and at approximately 11:00 p.m., he arrived on the scene.[25]

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[19] Haik's Mtn for SJ, Exh. H, Mosack Dep. at 153.

[20] Hornkohl's Mtn for SJ, Exh. K, Cole Dep. at 30.

[21] *Id.* at 23, 57-58, 63.

[22] Haik's Mtn for SJ, Exh. K, Cermak Dep. at 5.

[23] Pls' Reply Br. to Hornkohl's Mtn for S.J. (Dkt #109), Exh. S, Timothy Monck Aff.

[24] *Id.*

[25] Hornkohl's Mtn for SJ, Exh. F, Haik Dep. at 9.

The Sheriff's dive team loaded their equipment onto the Sheriff's boat. A fuse had blown on the boat and the lights and radio did not work.[26] At approximately 11:00 p.m., Cermack and Doering entered the water, utilizing a tow bar that pulled them behind the boat.[27] Lindeman, on the bridge, provided the location in the river that he last saw Beck. At 11:19 p.m., the decedent was located.[28] After the Sheriff's Department divers located the decedent, they placed him in a body bag underwater and brought him to the surface alongside the Coast Guard boat.[29] Due to the weight of the bag, the Coast Guard crew was unable to pull it up into the boat.[30] One of the divers used a knife to puncture the bag and release the water from inside of it.[31] The boat then went to the Arthur Street boat ramp where an ambulance was standing by.[32] Cardiopulmonary resuscitation was begun once Beck was removed from the Coast Guard boat and placed in the

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[26] Haik's Mtn for SJ, Exh. J, Haik Dep. at 20.

[27] Haik's Mtn for SJ, Exh. K, Cermack Dep. at 56.

[28] Hornkohl's Mtn for SJ, Exh. B, Kowalski Dep. at 71.

[29] Pls' Reply Br. to Hornkohl's Mtn for S.J. (Dkt #109), Exh. S, Timothy Monck Aff.

[30] *Id.*

[31] *Id.*

[32] *Id.*

ambulance.[33] Beck was pronounced dead shortly thereafter. This complaint followed.[34]

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[33] *Id.*

[34] Count I of the Amended Complaint is directed toward Haik and Manistee County and alleges that they were grossly negligent and violated Beck's federal and state civil rights by adopting a policy of preventing private rescue of drowning victims and providing body recovery as opposed to rescue services.

Count II alleges that Hornkohl and the City of Manistee were grossly negligent and violated Beck's federal and state civil rights in that: (1) Hornkohl acted with final responsibility for the City in establishing the policy of not initiating underwater rescue unless authorized by Haik and the County; Amended Compl. Count II ¶39; and (2) Hornkohl, in his official capacity, controlled the scene and personally prevented the MSRDT divers from commencing rescue operations within the time frame possible for Beck to have survived immersion.

Count III, brought by Mrs. Beck against all the Defendants, alleges that: (1) her "fundamental liberty interest" under the Fourteenth Amendment in saving her son's life was violated as a result of being restrained; Amended Compl. Count III ¶¶50-51; and (2) she "suffered a violation of her consortium rights to the enjoyment of her son under federal civil rights law." Pls' Reply Br. to Hornkohl's Mtn for SJ at 14-15. She also asserts a state law bystander's claim of grossly negligent infliction of emotional distress. Amended Compl. Count III ¶¶51-53

II

The Court first addresses the alleged violation of the decedent's due process rights.[35] The Plaintiffs aver that Hornkohl, acting for the City of Manistee, established the City's policy of not initiating underwater rescue unless authorized by Haik and the County.[36] The City's policy was that the City Police and Fire Department would respond to emergencies where the subject was visible in the water.[37] Where the subject became submerged under the water or no

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[35] The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 17, of the Michigan Constitution both guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." "Where the United States and Michigan Constitutions contain virtually identical provisions, federal construction of the constitution should be followed absent compelling reasons for an expansive interpretation of the state constitution." *People v. Stanaway*, 446 Mich. 643, 649 n.1, 521 N.W.2d 557 (1994). *See also Sitz v. State Police*, 443 Mich. 744, 763, 506 N.W.2d 209 (1993) ("Absent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or other matters of particular state or local interest, courts should reject the "unprincipled creation of state constitutional rights that exceed their federal counterparts.") Accordingly, the Plaintiffs' state constitutional law claim will not be addressed separately.

[36] Amended Compl. Count 2 ¶39.

[37] Hornkohl's Mtn for SJ, Exh. A., City of Manistee Cold Water Rescue Team Police & Fire.

longer visible, the Manistee County Sheriff's Department Dive Team would respond.[38] Hornkohl and the City had a contract with MSRDT whereby the City would not summon the MSRDT until the Sheriff and the County's dive team had been contacted and indicated that they were not responding.[39]

The Plaintiffs further allege that the Defendants provided body recovery services and not water rescue. They also contend that there was a policy whereby private persons attempting to rescue a drowning person would be subject to arrest.[40]

Specifically, the Plaintiffs assert that the Defendants prevented the MSRDT divers and Sharon Beck from attempting to rescue Beck without providing any meaningful alternative. They allege that Beck was submerged in water constituting a "cold water submersion" which increased the window for performing a successful rescue by approximately an hour ("the golden hour").[41] They argue that the Defendants' affirmative actions deprived Beck of the opportunity to be rescued within the hour time frame in which he had a viable chance of being resuscitated and that such

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[38] *Id.*

[39] *Id.*

[40] Pls' Reply Br. to Haik's Mtn for SJ at 3.

[41] Amended Compl. Count I ¶13; see Pls' Reply Br. to Haik's Mtn for SJ, Exh. AA, report of Alan Steinman; Exh. CC, report of Steven Linton.

policy and individual actions deprived him of a chance for survival in violation of his constitutional due process rights.[42]

Defendants argue that summary judgment should be granted because: (1) as MSRDT members, Mosack and Cole were independent contractors and the City retained the right to control their efforts because the state did not have a constitutional duty to provide rescue services; (2) even if Mosack and Cole were acting as private citizens, they were not restrained from attempting a rescue and no constitutional violation occurred; and (3) Hornkohl and Haik are entitled to qualified immunity because their actions did not violate any clearly established constitutional right.

Plaintiffs reply that summary judgment should not be granted because: (1) they have asserted a cognizable constitutional claim; (2) there is a genuine issue of material fact regarding the involvement of officials in Mosack and Cole's efforts to attempt a rescue; and (3) "there has been a concerted cover-up" including the loss of evidence, harassment of witnesses and obstruction of deposition testimony.[43]

The following additional facts are necessary for the resolution of the Defendants' motions. In support of their contention that an official "arrest policy" existed, Plaintiffs offer the deposition testimony of Fred LaPoint, who stated

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[42] Amended Compl. Count I ¶35.

[43] Pls' Reply Brief to Haik's Mtn for SJ at 14-15.

that Tom Guenthardt, Chief of the Stronach Township Volunteer Fire Department, had told him:

> that there was a document circulated to the volunteer fire department chiefs from Mr. Haik that declared that any water accident scene was a crime scene and that if members of the Manistee Search and Rescue Dive Team showed up and attempted to go into the water in an effort to attempt a rescue of a person that [they] would be placed under arrest for impeding a police operation.[44]

LaPoint never obtained a copy of the policy. LaPoint also stated that Paul Lamunyon, a member of MSRDT, was aware of the policy but unable to locate a written copy. Detective Sergeant James Grabowski, employed by the City of Manistee, testified he had seen such a policy and that LaPoint had given him a copy but that he was unable to locate it now.[45] Plaintiffs also offer as support the Manistee County Sheriff Department Underwater Search and Recovery Unit's policy statement that "the unit will respond to each scene of a water related incident and treat it as a crime scene."[46]

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[44] Pls' Reply Br. to Haik's Mtn for SJ, Exh. X, LaPoint Dep. at 133.

[45] Pls' Reply Br. to Hornkohl's Mtn for SJ, Exh. K, Grabowski Dep. at 44-45.

[46] Pls' Reply Br. to Hornkohl's Mtn for SJ, Exh. J, Manistee County Sheriff Dept. Underwater Search and Recovery Unit Policy Statement and Purpose.

Plaintiffs state that the County Sheriff's statement of policy is not, however, the alleged "arrest" document and suggests that this document "disappeared."[47] They also cite a 1993 incident in which Hornkohl instructed MSRDT divers not to enter the water because it was too dangerous.[48] Finally, they offer the deposition testimony of LaPoint and Arthur Krause, a MSRDT diver, that Haik had stated earlier that he would not work with civilian divers.[49]

The crux of Plaintiffs' claim is that Mosack and Cole were prevented by Hornkohl and the "arrest" policy from attempting a water rescue of Beck in violation of his constitutional rights.[50] According to Mosack, he and Cole informed Hornkohl that they were members of the MSRDT and offered their services.[51] Hornkohl told them that the Sheriff's team was en route. He advised that they should "stand by"[52] and that he would let them know if they were needed. Plaintiffs also offer: (1) the deposition testimony of Krause that Mosack had told him that Hornkohl advised he

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[47] Pls' Reply Br. to Haik's Mtn for SJ at 3.

[48] Pls' Reply Br. to Hornkohl's Mtn for SJ at 2.

[49] Pls' Reply Br. to Haik's Mtn for SJ, Exh. X, LaPoint Dep. at 194; Pls' Reply Br. to Hornkohl's Mtn for SJ, Exh. BB, Krause Dep. at 19.

[50] Amended Compl. ¶19b.

[51] Haik's Mtn for SJ, Exh. H, Mosack Dep. at 153.

[52] *Id.*

and Cole to stand by;[53] and (2) LaPoint's testimony that Cole and Mosack said that they did not go into the water because "of the threat of arrest and because Hornkohl had told them they could not.[54]

Section 1983 imposes civil liability on a person acting under color of state law who deprives another of the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. 1983. To establish a claim under § 1983, a plaintiff must show that: (1) he held a constitutionally-protected right; (2) he was deprived of this right; (3) the Defendants acted with reckless indifference to cause this deprivation; and (4) the Defendants acted under color of state law. The threshold issue presented therefore is whether the Defendants deprived the Plaintiffs of a right "secured by the Constitution and laws." *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1060 (6th Cir. 1998).

The United States Supreme Court has stated that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) (citations omitted). It serves "as a limitation on the State's power to act" and "confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the

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[53] Pls' Reply Br. to Haik's Mtn for SJ, Exh. BB, Krause Dep. at 52.

[54] Pls' Reply Br. to Haik's Mtn for SJ, Exh. X, LaPoint Dep. at 195.

individual." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

The Plaintiffs' claimed due process right has its genesis in *DeShaney*. In that case, the United States Supreme Court held that a state did not have a constitutional duty to protect a child, Joshua DeShaney, from attacks by his father even though the state had received reports of the father physically abusing the child. The Court stated that "[w]hile the State may have been aware of the dangers Joshua faced in the free world, it played no part in their creation, *nor did it* do *anything to render him any more vulnerable to them.*" (Emphasis added.) *DeShaney*, 489 U.S. at 201. This dicta left open the possibility "that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action." *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990). It is within the contours of this theory of liability, that affirmative action by the state increased the risk of harm to the decedent, that the Plaintiffs' constitutional allegations lie.

The claimed due process violation asserted by the Plaintiffs was recognized by the Seventh Circuit in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). During the City of Waukegan's Lakefront Festival on the shores of Lake Michigan, William Ross, twelve years old, and a friend wandered onto a breakwater that extended out into the lake. The boy slipped and fell into the lake. His friend ran for help. Within ten minutes, two lifeguards, two firefighters, a city police officer and two civilians who had been scuba diving

nearby were on the scene and prepared to effect a rescue. Lake County Deputy Sheriff Gordon Johnson arrived on the scene in a patrol boat. Gordon instructed all bystanders that no one was to enter the water until an official county rescue team arrived.

The City of Waukegan and Lake County previously had entered into an intergovernmental agreement that gave the County the responsibility to provide all police services in the entities' concurrent jurisdiction on Lake Michigan. Pursuant to its authority to police the lake, the County had promulgated a policy under which only divers from the City of Waukegan Fire Department could attempt to rescue a person in danger of drowning in Lake Michigan. Further, the policy directed all members of the county sheriff's department to prevent civilians from attempting to effect a lake rescue.

The city officials who were present when the boy began to drown apparently did not act because of the policy of deferring to the County. When the civilians stated that they would attempt a rescue at their own risk, Gordon threatened to arrest them and positioned his boat to prevent their dive. Twenty minutes after the initial rescuers arrived at the scene and approximately thirty minutes after the boy had fallen into the water, the authorized divers retrieved Ross' body. *Ross*, 910 F.2d at 1424-25.

The plaintiff, as in the case at bar, brought a complaint against the City of Waukegan,[55] Lake County, the county

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[55] The district court dismissed the City of Waukegan defendants. The Seventh Circuit affirmed, concluding that the City

sheriff and deputy sheriff, alleging, *inter alia,* that interfering with private rescue efforts without providing a meaningful alternative deprived Ross of his constitutionally protected right to life. The district court dismissed the Lake County defendants, reasoning That the alleged policy was a rational choice among a range of policy options and granted summary judgment to the Deputy Sheriff on the basis of qualified immunity. *Id.* at 1430, 1432.

The Seventh Circuit, however, reversed summary judgment on the grounds that the policy alleged by the Plaintiff was sufficient to maintain a claim that the county[56] arbitrarily denied the decedent of his Fourteenth Amendment right to life. *Id.* at 1430. The court stated the alleged policy "not only tolerated a risk that someone might drown but actually contemplated that someone would die for the sake of preventing harm to private rescuers" and evinced a deliberate indifference or recklessness requisite to sustain a constitutional violation. *Id.* at 1431. The Court concluded that it was clearly established that a citizen in peril for his life had a constitutional right that prevented a police officer from

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was not liable because under the arrangement with Lake County, the City of Waukegan had no authority to influence the County's procedures. *Id.* at 1428-29.

[56] The Seventh Circuit held that the policy could be attributed to the County because the complaint alleged that the County and the sheriff acted together in formulating the policy. *Ross*, 910 F.2d at 1430 n.5.

cutting off private avenues of lifesaving rescue without providing an alternative. *Id.* at 1432.

Whatever constitutional right to unhindered private rescue efforts Beck may have had in light of *Ross,* the Court is not persuaded that the facts of this case, viewed in the light most favorable to the Plaintiffs, present a constitutional violation. Mosack only had the bottom of his wet suit on and Cole had not yet put on his wetsuit in preparation.[57] Cole, upon his arrival, did not attempt to enter the water. He instead sought out "someone in charge."[58] Although Plaintiffs assert that Mosack and Cole were "prevented" from going into the water by police officials,[59] Mosack's deposition testimony was that Hornkohl told Cole and him to "stand by." Cole, when asked whether he was told that evening that he could not go into the water, responded, "*Not in so many words.*"[60] (Emphasis added.) Even assuming that it was Hornkohl who said to "stand by," the type of threat and restraint seen in *Ross* is lacking here. Hornkohl's alleged statement to Mosack and Cole cannot be compared with the Deputy Sheriff's conduct in *Ross* of ordering all persons on the scene to stop their efforts, threatening to arrest the civilians and positioning his boat so that they were unable to enter the water. *Ross,* 910 F.2d at 1424. Plaintiffs have not

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[57] Hornkohl's Mtn for SJ, Exh. K, Cole Dep. at 22.

[58] *Id.*

[59] Pls' Reply Br. to Hornkohl's Mtn for SJ at 5.

[60] Hornkohl's Mtn for SJ, Exh. K, Cole Deb. at 64.

offered any evidence that the divers were physically prevented or threatened with arrest if they attempted to go into the river or that they even attempted to do so. The Sheriff's diving team had already been notified and was en route. Beck had last been seen in the middle of the river, approximately one hundred feet from shore. Hornkohl reasonably could have concluded that permitting Mosack and Cole to attempt to dive would complicate the better equipped efforts of the Sheriff's diving team or place them in jeopardy. The decision was an objectively reasonable response and attempt to coordinate rescue efforts.

Even if the Defendants' action could be construed as violating the decedent's constitutional rights, such a conclusion could not have been clear to Haik and Hornkohl, thus entitling them to qualified immunity. Under the doctrine of qualified immunity, government officials acting in their official capacities are protected from being sued in their individual capacities for damages if their actions did not "violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." (Emphasis added.) *Greene v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)).

The Sixth Circuit has provided that disputes over qualified immunity should be analyzed in two steps:

> [T]he first step is to determine whether plaintiff has shown a violation of a constitutionally protected right. If the answer is yes, then the second step is to determine whether the right is so clearly established that

> a reasonable official would understand that what he is doing violates that right . . . . Ordinarily, to conclude that a constitutional right has been so clearly established that a reasonable official would understand that what he is doing violates that right . . . , a district court within this circuit must find binding precedent from the Supreme Court, the Sixth Circuit, or . . . itself. . . . Sometimes, the decisions of other courts can also clearly establish the law; but they must point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional . . . . Related to this principle is the notion that the absence of a case directly on point does not automatically endow an official defendant with the shield of qualified immunity.

(Citations omitted; internal quotation marks omitted.) *Summar v. Bennett,* 157 F.3d 1054, 1058 (6th Cir. 1998).

Viewed in the light most favorable to the Plaintiffs, neither Haik's or Hornkohl's alleged actions violated any clearly established right to substantive due process.

This was the conclusion of the district court in *Rogers v. City of Port Huron,* 833 F. SUPP. 1212 (E.D. Mich. 1993). *Rogers* involved an intoxicated man who had passed out by the side of the road and had been observed by bystanders. Police arrived and told the bystanders, who did

not know Rogers, not to take him home. They stated that they were going to let him sleep it off, and that they would check on him later. The officers left. When the bystanders returned later that evening to check on the man, they discovered that he had been struck by a car. Plaintiffs alleged, *inter alia,* that the officers could be held liable for preventing private citizens from rescuing the decedent. The district court dispensed with this claim, stating that "this Court does not believe that a police officer's failure to rescue, or a police officer's actions preventing others from rescuing a victim, violates a clearly established constitutional right" for purposes of qualified immunity. *Id.* at 1219.

The same conclusion was reached by *Andrews v. Wilkins,* 934 F.2d 1267 (D.C.Cir. 1991). In *Andrews,* the Plaintiffs alleged that police interference with private citizens' rescue attempts violated the decedent's constitutional right to due process. The Circuit Court disagreed and concluded that it was "by no means clearly established that such a right precluded police efforts directed at the safety of the potential private rescuer." *Id.* at 1271. *See also Franklin v. City of Boise,* 806 F. SUPP. 879, 888 (D. Idaho 1992) (finding police officers acted reasonably in prohibiting an intoxicated private rescuer from diving after an individual who fell into a pond and drowned while resisting arrest).

Because the Court concludes that the decedent's constitutional rights were not violated, and in any event, Haik and Hornkohl are entitled to qualified immunity, summary judgment is granted as to the constitutional claim asserted on behalf of the decedent in Counts I and II. Because Sharon Beck's asserted § 1983 loss of consortium claim is derivative of the decedent's constitutional rights, summary judgment is

granted as to this claim alleged in Count III of the Plaintiff's complaint.[61]

III

The Court next addresses the Defendants' motions for summary judgment as to the Plaintiffs' state law claims asserting that the Defendants' conduct was grossly negligent.

The Michigan Governmental Immunity Act, M.C.L.A. § 691.1401 *et seq.*; M.S.A. § 3.996 (101) *et seq.*, provides that an officer and employee of a governmental agency is immune from tort liability for injuries to persons or damages to property caused by the officer while in the course of employment if "[t]he officer's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage." M.C.L.A. § 691.1407(2); M.S.A. § 3.996 (107).

Even assuming that Hornkohl did tell Mosack to "stand by," such a decision did not constitute gross negligence. He did not threaten or restrain Mosack or Cole from entering the water. Moreover, the Sheriff's dive team had been contacted directly after the 911 call had been

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[61] Accordingly, the Court need not discuss the merits of Sharon Beck's contention that this Court should recognize a loss of consortium claim under § 1983. See *Purnell v. City of Akron*, 925 F.2d 941, 948 n.6 (6th Cir. 1991) (declining to address the issue of "whether a decedent's immediate family may bring a 1983 claim for deprivation of the parent-child relationship in the wrongful death context.")

received. The team, equipped with a boat, was en route when Hornkohl had the alleged conversation with Mosack and Cole. It was dark, Beck had last been seen in the middle of the river, and his precise location was unknown. Hornkohl reasonably could have advised against an entry in the interests of the divers' safety and a desire not to complicate efforts by the Sheriff's divers. Cole conceded that in an emergency situation, it is critical to maintain an organized effort to forestall complications and prevent others from being injured. Appreciating this principle, Cole stated that he sought out an official that evening because "in an emergency situation, you can't just start free-lancing. [W]hoever is in charge needs to direct activity because you don't know what [the] situation is--there may be a very good reason that they don't want you in that situation."[62]

Neither Mosack nor Cole stated that they were threatened with arrest pursuant to the alleged policy of the County and Haik. As for the activities that evening, Haik did not even arrive on the scene until the operations of the Sheriff's diving team were underway. The Court is satisfied that neither Defendant's conduct constituted gross negligence, i.e., conduct "so reckless as to demonstrate a substantial lack of concern for whether injury results." M.C.L.A. § 691.1407 (2); M.S.A. § 3.996 (107) (2) (c).

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[62] Hornkohl's Mtn for SJ, Exh. K, Cole Dep. at 21.

IV

As a final matter, the Court considers the Defendants' motions for summary judgment as to Sharon Beck's federal and state law claims.

Count III alleges that the Defendants violated Sharon Beck's constitutional rights. Specifically, she contends that she has a "fundamental liberty interest" under the Fourteenth Amendment in preserving the life of her son and relies on *Kallstrom* as authority for this alleged constitutional right.[63] Sharon Beck argues that *Kallstrom* stands for the proposition that she has a Fourteenth Amendment right to be free of restraint and interference of others which the Defendants violated when she was restrained.

The Court is not persuaded that *Kallstrom* supports the Plaintiffs' constitutional theory. The issue presented to the Sixth Circuit in *Kallstrom* was whether the disclosure by State officials of undercover police officers' personal information to drug defendants' legal counsel violated the officers' substantive due process right to personal security and bodily integrity. *Kallstrom,* 136 F.3d at 1059. The Court concluded that the plaintiff police officers possessed a constitutionally protected privacy interest in this information. Although *Kallstrom* speaks of the plaintiff police officers' fundamental liberty interest "in preserving their lives and the lives of their family members," it was within the context of the release of constitutionally protected personnel information which might subject the plaintiffs and their families to physical danger. *Id.*

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[63] Pls' Reply Br. to Hornkohl's Mtn for SJ at 13.

at 1062. The Court held that "where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat the 'magnitude of the liberty deprivation . . . strips the very essence of personhood.'" (Citation omitted.) *Id.* at 1064. Sharon Beck's attempt to apply *Kallstrom* to the facts of this case to craft a constitutional right to be free from physical restraint is unavailing.

Nonetheless, even assuming that Sharon Beck enjoyed the constitutional right she asserts, the facts of this case do not establish that a constitutional violation occurred. LaPoint testified that he saw a hysterical woman attempting to run down the riverbank, that the bank was quite steep, that he was concerned for her safety so he restrained her. LaPoint testified that he "heard Mrs. Beck screaming and come running across the street towards the riverbank; [he] held her; sat her down."[64] When LaPoint was advised to return to the Fire Department, he "walked Mrs. Beck over to the ambulance to make sure there was somebody to keep an eye on her so she didn't attempt to go down the riverbank or injure herself in any way."[65] LaPoint's conduct was motivated by a concern for her safety as well as concern for the safety of those who might be called upon to rescue her. His actions were reasonable in light of the fact that it was night, the decedent was last seen in the middle of the river, Sharon Beck was not equipped to dive, Defendants had no knowledge of her swimming ability and she was quite agitated. No constitutional violation exists in preventing

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[64] Haik's Mtn for SJ, Exh. N, LaPoint Dep. at 148.

[65] *Id.* at 149.

rescue efforts in order to protect rescuer's safety. *Andrews,* 934 F.2d 1267 (no constitutional violation when police intervene with private rescue attempts when not aware of rescuer's level of safety training); *Rogers,* 833 F. SUPP. 1212 (no liability when police leave drunken driver lying on side of road and refuse to tell passers-by his address so that they could take him home); *Franklin,* 806 F. SUPP. 879 (no liability when officials would not permit private citizen to rescue drowning person since they reasonably believed rescuer was drunk and would injure himself).

The Court's conclusion that the Defendants' conduct did not rise to the level of gross negligence is dispositive of Sharon Beck's final claim cf grossly negligent infliction of emotional distress.

CONCLUSION

For the reasons cited within, the Defendants' motions for summary judgment as to all counts are granted. An order consistent with this opinion will be entered.

Date: December 9, 1998

/s/_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed December 9, 1998]

No. 1:97-CV-533

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually,
Plaintiffs,

v.

SHERIFF EDWARD A. HAIK, individually and officially for Manistee County; MANISTEE COUNTY; ROBERT C. HORNKOHL, individually and officially as Director of Public Safety for City of Manistee, and CITY OF MANISTEE,
Defendants

HON. ROBERT HOLMES BELL

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Defendants City of Manistee and Robert C. Hornkohl's Motion for Judgment on the Pleadings, Or in the Alternative, Summary Judgment (Dkt #122, 123) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Sheriff Edward A. Haik and Manistee County's Motion for Summary Judgment (Dkt #159-160) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants City of Manistee and Robert C. Hornkohl's Motion for Summary Judgment (Dkt #60) is **GRANTED**.

Date: December 9, 1998

/s/_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed October 2, 1998]

No. 1:97-CV-533

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually,
Plaintiffs,

v.

SHERIFF EDWARD A. HAIK, individually and officially for Manistee County; MANISTEE COUNTY; ROBERT C. HORNKOHL, individually and officially as Director of Public Safety for City of Manistee, and CITY OF MANISTEE,
Defendants

Oral Argument
Re: Defendants' Motion for Summary Judgment

Before

THE HONORABLE ROBERT HOLMES BELL
United States District Judge
October 2, 1998

APPEARANCES

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Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

Grand Rapids, Michigan
October 2, 1998
1:55 p.m.

PROCEEDINGS

THE COURT: We are here for the afternoon in the matter of *Beck v. Haik and Manistee County and the City of Manistee and Hornkohl*. This is the Court's file 97-CV-533 by number.

There appears to be, before we get into the motions of the defendants' for summary judgment, a motion to extend the period to respond to mediation, is that right?

MR. PARSONS: Your Honor, the plaintiff filed that motion, and it may be moot now because yesterday was the date for responding to mediation. There was an issue -- I failed to pay a second mediation fee to have the two plaintiffs considered separately by the mediators, and so we got a single award that refers to plaintiff. And I filed a motion to extend time so that the -- and I believe the defendants stipulated, I know the defendant city and Hornkohl did, to allow a three-page supplement regarding the allocation of the mediation award between two plaintiffs.

THE COURT: Well, let me ask the question. Does somebody want me to do something or not? Normally people want me to do something.

MR. PARSONS: All right. In my -- yes, Your Honor. In my motion --

THE COURT: Otherwise I'd just like to hear what you have to say.

MR. PARSONS: No, I know. I won't do my whole tap dance, but I met with my clients a week ago and said, I can't figure out how we do this. It took a little negotiation. I believe all parties are in agreement that if the Court granted that relief to extend time under certain circumstances which includes the ability to submit a three-page brief solely on the issue of allocation of the total amount, that Mr. Dugan, the mediator, would pass it among the mediators and do it again. And I have --

THE COURT: Well, I guess maybe I have a more preliminary procedural question. Is this a matter that you're representing is done by stipulation and I'm being asked to approve a stipulation or is this a contested matter that the Court is being asked to rule on as a matter of fairness or whatever? That's the only question I have.

MR. PARSONS: I haven't received -- I don't believe I've received a stipulation for both parties, both defendants, have I?

THE COURT: Ms. Olsen?

MS. OLSEN: Your Honor, if I could address the Court. It was my understanding we received a call I believe yesterday asking if we would stipulate to it and we were advised that if we did stipulate to it, it would be taken care of. So it was our understanding that it was a moot issue, and I think I speak for Ms. Jasinski as well.

MS. JASINSKI: I received a call from this Court saying the Court approved the stipulation on Tuesday, Tuesday or Wednesday. I got a call on Wednesday that the

Court approved the stipulation. The 30th, September 30th, I received a phone call that the Court had approved the stipulation.

THE COURT: Well, I --

MS. JASINSKI: So I thought --

THE COURT: Maybe we've got a miscommunication. I think the Court was going to approve it as long as it was a stipulation.

MS. JASINSKI: Yeah, I think I called Tuesday morning on -- I received the phone call Monday, we signed the stip, it was all signed, I received a copy of it Tuesday. I spoke with your case manager Tuesday morning and she had received a copy of the signed stipulation.

THE COURT: All right, okay. It will be done. It's over. Issue moot.

All right. Let's proceed, then, with these motions for summary judgment. The Court has received the motions and carefully reviewed them and the responses, and I believe one or two brief replies in response thereto.

Ms. Olsen, Ms. Jasinski, one of you wish to proceed first? Ms. Olsen?

MS. OLSEN: I would be happy to proceed first since my motion has been filed the longest, Your Honor.

THE COURT: Okay.

MS. OLSEN: Gretchen Olsen appearing on behalf of the City and the former Director of Public Services, Robert Hornkohl.

Your Honor, I am certain that you have read all the briefs and are fully acquainted with the facts and no doubt know the legal arguments better than we do.

THE COURT: Great assumption. I hope so.

MS. OLSEN: May I first inquire, how would you like me to proceed? I was not going to discuss the facts whatsoever. I would be happy to address if there are any questions regarding the facts or I would be happy to just proceed with my argument that I have outlined.

THE COURT: Well, I'm a little bit troubled because I believe it is your -- one of your colleagues' responses to the response brief of the plaintiff indicated there were some factual glosses that were made by the plaintiff that were not appropriate. And do those factual glosses -- I'm calling them that for lack of a better term -- do they impact upon the legal standards the Court is required to establish here in this matter, particularly as it goes to the qualified immunity? Maybe that's too broad a question.

MS. OLSEN: I'm not certain I'm clear on what you're referring to, Your Honor.

THE COURT: No, I'm sorry. I have -- it is Ms. Jasinski's brief which talks about some of the factual issues being glossed over by the plaintiffs' counsel allegedly and I'm

wondering if those affect it. But go ahead with your argument.

MS. OLSEN: Thank you, Your Honor.

THE COURT: And particularly I'd like to hear amplification not of your case or your brief as much as the response that was made by the plaintiff to your brief.

MS. OLSEN: Okay. Okay.

As I see it, Your Honor, the only response, frankly, made to our brief is this *Kallstrom* argument, increase of risk. That is the only issue of any substance that I see in plaintiffs' response to our motion.

He fails to address the legal argument in terms of whether there was a -- whether the policy itself was unconstitutional in terms of the municipal liability. He also didn't address in my mind the same issue with respect to Chief Hornkohl officially. Instead, he comes up with this what I am going to characterize as somewhat of a novel argument using the *Kallstrom* case, suggesting that this case is similar in presenting an increased risk of harm.

If the Court would like me to expound upon that, I'd be happy to. I don't think that theory is applicable whatsoever to this case, and I don't think so because liability under that theory, the state-created danger theory is predicated upon an affirmative act by the state which creates increased risk that the individual is going to be exposed to private acts of violence. We clearly don't have such a situation here in this case.

Secondly, to invoke that rule, plaintiffs have to show that we placed him -- that defendants' actions placed Beck in some special danger different from the risk affecting the public at large. Once again, it's our contention he can't do that here. Furthermore, there is nothing that the defendants did to increase the risk that this decedent already faced. He put himself there. He made this decision to jump off this bridge. We didn't increase his risk. So it's our contention the theory that they have come up with, and I think that maybe they're searching for an alternative theory because they know the law is so strong against them on our arguments, but that theory in our mind is entirely -- it's not applicable to this case whatsoever.

I think it's important that the Court -- and I'm sure that Your Honor is well aware of this, but undisputed facts, the City has a policy. The policy provides that if there is a need for underwater rescue or recovery within city limits, we refer to the county dive team. If the county dive team can't respond for whatever reason, either their team members are on vacation, they're sick, or they're at the far reaches of the county, the City went one step further and had this contract in place with this volunteer group, the MSRDT, Manistee Search and Rescue Dive Team. So when the City decided to get out of the business of providing underwater rescue or recovery, they did so only with the view in mind that they were providing alternatives.

Now, you know, frankly, we know that constitutionally the City could have simply said, We don't do this, sorry, and left it at that. I mean, they could have done that.

THE COURT: Did they have a statutory obligation under Michigan to undertake such as the obligation that all municipalities are under to provide fire protection, police protection and other such things? Is there any statutory duty imposed upon municipalities or imposed upon any localities as it pertains to water rescue?

MS. OLSEN: Not as it pertains to water rescue, Your Honor, but there is a statute that does pertain to body recovery. And that's how the statute is written, body recovery. Much different than rescue.

At the same time the statute allows a municipality, for example, to decide that they cannot afford to provide recovery and utilize the services of someone else, another municipal entity, to do that. I mean, I think it's obvious that there are many, many small municipalities along our Great Lakes that simply don't have those types of services. They can rely upon others to provide body recovery.

So we know constitutionally that the City could have simply just thrown their hands up and said, We don't have to do anything. We don't have to recover anybody or rescue anybody. If a call comes in, sorry, we don't provide that service. They could have done that. But at the same time what's constitutionally permissible is obviously not necessarily good public policy.

So they entered into this decision to have this policy with a lot of thought in mind. And there were many, many meetings which city personnel attended, county personnel attended, sheriff attended, state police attended. They had many meetings before they came up with this policy. And as

I indicated, when they did so, they did so with an intention in mind of providing alternatives.

Now, it is plaintiffs' contention in his response that Chief Hornkohl individually or by official policy prevented private rescue in violation of the decedent's constitutional rights. I think the official policy is easily disposed of. I just discussed it. There is no policy to prevent private rescue. Policy doesn't say that. Furthermore, there is no testimony to support a custom or practice of private rescue.

Now, that takes me back, Your Honor, to historical information that perhaps it's important that the Court be aware of, and I think that plaintiff is probably going to discuss it in his response. What happened to bring about this concern for the policy and revisitation of the policy was an incident in January of '93 known as the Vadaboncoeur incident. What happened there was a gentleman was being chased by the State Police and he went off a ramp in the course of this chase and into the Manistee River. The State Police sent out a response for divers. Apparently the sheriff's dive team responded and one member from the city's dive team responded.

At this time in 1993 the City had two people within its ranks that had diving experience and were qualified, and they relied on these people informally. There was no established dive team. So the one officer that responded from the City, Fred LaPoint, heard the call, got his equipment, ran down there.

And the night -- it's important to know about the weather. It was the middle of the night or it was very late at

night. It was frigid. The water temperature was about freezing. There were ice chunks coming in the channel. Mr. LaPoint wanted to dive. Chief Hornkohl was there. He was reluctant because there was only one man, one diver. But he said, Okay, if you tether yourself, I'll let you go in.

LaPoint went in, had a problem with the tether first, and then his regulator froze up, part of his dive equipment. So it froze up because, according to his testimony, the water was near freezing. He came out of the water, thawed out his regulator, wanted to go back in, and at that point Hornkohl said, Uh-uh. This is too dangerous. Your regulator's gonna freeze up again. I don't think you should go in. The testimony is that Hornkohl did that with some input from the sheriff's dive team indicating that the sheriff's team wouldn't allow their members to dive and the sheriff's lead team member didn't think it was safe.

Now, the rest of the story is that there was another private diver that showed up after LaPoint was out of the water trying to thaw out his regulator and he wanted to go in too. But at that point Hornkohl had called off the dive. So Hornkohl didn't -- Hornkohl said no, the dive's called off, don't go in. Presumably this is the testimony.

That person is now on the MSRDT dive team. He -- these various members in the community were concerned that they wanted to provide these types of services, and that's initially what started the City to reconsider its dive team. Additionally, the most important point was that one diver went down, and according to OSHA regulations, that's against the law.

So the City said hey, we don't have the resources, we don't have the manpower, and we're concerned about liability here. We can't train, we don't have enough people that are qualified to dive. So after all of these meetings and consideration, they decided to get out of the business of diving. Now, obviously, when they made that decision to discontinue the services, they did so based on these competing social, political, and economic forces. So it's our contention that the decision to do so and adopt this policy was certainly rationally based, not arbitrary or capricious.

Now, that goes back to -- and the reason that I related that history, Your Honor, is because I suspect that Mr. Parsons is going to utilize that one incident as support for a custom and practice, perhaps, on behalf of Hornkohl to do what he did. Well, for one thing, the one diver was a city diver, so it wasn't a private rescuer. And the other diver, certainly there were very significant reasons for not allowing the divers to continue to dive and go in given the fact that their regulators were freezing and very likely they might have been lost as well.

But that gets us to the point of did Hornkohl in this case prevent private rescue? Did he individually by his actions that night prevent private rescue as the plaintiffs contend in their response?

First of all, he's got to get over the issue that the MSRDT, Manistee Search and Rescue Dive Team, weren't just happenstance bystanders there. While they weren't toned out, they identified themselves when they called 911 as MSRDT members. The testimony of Mosack, if we believe it, which of course we have to for purposes of the motion,

was that they identified themselves to Hornkohl as MSRDT. Therefore, according to the contract, they knew and they testified that they had to get the go-ahead from Hornkohl or a person in charge in order to go in. Hence these people, these two members that were apparently there can't be considered private divers as plaintiff tries to characterize them. Therefore, the whole point of this is if the City itself had the right to withhold services without the threat of a constitutional violation, certainly the City had the right to withhold the services of their independent contractors, these MSRDT men.

But even if the Court accepts the fact that these two divers were so-called private divers, just happenstance bystanders, is there really credible evidence to get to a jury that Hornkohl prevented them from going in? In our brief we outlined the problems that plaintiff has with the testimony on the issue.

The one diver said I didn't talk to Hornkohl. Hornkohl said I didn't talk to any MSRDT diver. It's only Mosack that said Cole talked to Hornkohl. But assuming the truth and the admissibility of all of that testimony, Hornkohl said, Stand by. Your services aren't needed right now. The sheriff team has been called. You'll be notified if you're needed. That's the worst that we can attribute to Hornkohl if we believe all the testimony. There's no evidence that Hornkohl prevented them from going in. There's no evidence that Hornkohl advised them that they were going to be in trouble or otherwise arrested if they did so.

It's interesting, if in fact they are private divers, why did they even bother to seek out Hornkohl's permission in the

first place if they're just these bystanders? They did so, Your Honor, because they know that it's critically important to have coordinated rescue efforts, and their lives depend upon it if they're going to dive.

So the facts are certainly different from the *Ross* case the plaintiff relies upon. And in fact Mosack testified on Page 12 which is attached, I think it's in our supplemental response, that the reason he didn't go in was because of Haik's alleged policy of treating all water emergencies as a crime scene, not because of what Hornkohl said.

So it is our contention that plaintiff is not able to show by more than a scintilla of evidence that there is a genuine issue of material fact on that issue, and for that reason we think we're entitled to summary judgment.

That really hasn't even addressed -- well, I briefly did, the issue of municipal responsibility. In other words, was the policy arbitrary, was it shocking to the conscience, and was it adopted with deliberate indifference to the known and obvious consequences? Again, plaintiff doesn't -- he doesn't address that issue, nor does he address the same issue with respect to Hornkohl. I think that those are very strong arguments, and I suspect that's why he didn't bother to address them.

As for the issue, finally, Your Honor, of the liability of Hornkohl individually, they must prove that Hornkohl violated a constitutional right, and the right had to be clearly established at the time of the incident. We know from the Sixth Circuit that it's only in extraordinary circumstances that the Court should look beyond the Supreme Court and Sixth

Circuit precedent to find clearly established law. And we also know as of 1995 and even today there was no Supreme Court or Sixth Circuit decision concluding that interfering with bystanders' rescue attempts amounts to a constitutional violation.

Now, plaintiffs rely upon the Seventh Circuit decision of *Ross v. United States*, and I certainly think that that is distinguishable in and of itself on the facts, and the facts in that case are much more egregious. Plus we also know hat the Eleventh Circuit refused to rely upon the *Ross* decision and dismissed claims on qualified immunity.

Therefore, there's no clear precedent from other circuits that would have been available then or even now to guide the chief's actions. So should this Court even look beyond Sixth Circuit precedent, there really isn't any clear guiding law, and on that basis we believe that Chief Hornkohl is entitled to qualified immunity.

Now, I'm not going to bother to address the remaining arguments that we've made. I think the law is pretty clear. I think the law is very strong with regard to them.

If the Court has a question at this stage, I would be pleased to try and answer it.

THE COURT: No, thank you. Thank you. We'll listen to Ms. Jasinski at this time.

MS. JASINSKI: Good afternoon. First, Your Honor, what was the question regarding the response brief of Sheriff Haik and Manistee County?

THE COURT: There were -- in the response brief you somewhat took to task, as I recall, the plaintiffs' factual characterizations of the testimony, and I'm wondering if in those factual characterizations you were attempting to conclude that there were not facts sufficient to sustain the plaintiffs' defense to these motions. Were those the kind of facts that you were taking issue with or was it just a general characterization of facts?

MS. JASINSKI: I get a little nervous when I get a response to a dispositive motion that throws some facts in that are not supported. I get a little nervous because sometimes I think that we might get off our legal issues and what the legal issues are and get sidetracked on factual issues. But then again, I feel I have to address these factual issues because they try to set up a scenario which isn't true and it's not supported. So I really can't let those issues lie even though I don't think they would address the legal issues.

There's only two factual issues that I raise or that Sheriff Haik raises in his motion. One is that he was not at the scene for well after -- I think the factual information we provided is that he received a phone call from the undersheriff that evening around 10:40, I believe was the time, and we established that through the phone bills because we have the undersheriff's cell phone to the sheriff. That was the first we learned of it.

The importance of that is there is a -- you know, there's claims that we prevented private divers, Sheriff Haik prevented private divers from going into the water. I mean, there's just absolutely no way that happened because he had absolutely no contact with the scene whatsoever. And I

wanted to make sure that the only prevention we're talking about is the supposed arrest policy that he gave some two or three years before Mr. Beck's drowning.

And there is problems with claims such as, you know, he made the statement, you know, Sheriff Haik made this, I'll never allow private divers and I'll arrest you because there is some challenge to his authority and he took it this way and to make people pay for that type of challenging his authority. I'm always afraid we're going to get sidetracked onto these types of claims and not deal with the legal issues, which is why I did want to address why do we have these claims, they're not supported, and hopefully we won't get sidetracked on them because I would rather talk about the legal issues.

As to Sharon Beck there is a claim -- and plaintiffs always seem to be careful to use "defendants" in the plural--that defendants prevented Sharon Beck from rescuing her son. And it has got to be clear to everyone at this point, and I'm not sure why we keep on hearing this, Sheriff Haik, any deputy sheriff was not even at the scene when she supposedly ran down to the bank to rescue her son from some 30 feet underwater in the channel, but that it was someone else, an ambulance attendant, who was simply afraid, I think, she was going to fall from reading his testimony. But one way or another, I don't even think he had any contact with Sharon Beck throughout the evening. So to say that we somehow prevented her from rescuing her son is just not there.

The claim is that there's private divers there at the scene willing to rescue Mr. Beck and are not rescuing Mr. Beck because Sheriff Haik announced two to three years earlier that he would arrest anyone who tried to, I guess, dive

into water to rescue someone. We don't even have clearly what this statement or what this policy is. It seems to be just the MSRDT divers. Two of them seem to say that they thought they would be arrested if they tried to attempt a private rescue.

There is also a claim that this policy of Sheriff Haik's was in writing. Never have we seen that policy. We know why we haven't seen it, and that's because there is no such policy.

We have one individual, a Detective Sergeant Grabowski, who says I did see it, I had it, I cannot locate it anymore. I keep on seeing statements that try to set this up as there's something, you know, behind this, this disappearance, you know. The policy has now disappeared, it's gone. Grabowski says, Well, I had it. I can't find it anymore. I misplaced it. I've been going through my records, I can't find it, but I got it from Fred LaPoint.

We asked Fred LaPoint, you know, have you ever seen this in writing? Well, no, I've never seen it in writing. I heard about it from somebody else. He saw it in writing. We went to that person. Did you see this in writing? No, I never -- in fact, I never even heard of it. So this claim that there is a written policy is pretty -- well, I mean, we've never seen the writing yet.

There's no policy or practice of arresting people who try to rescue individuals underwater. I mean, I'm not aware of any incident where there has been a drowning where we had private divers, anyone try to go in, rescue someone, and that person was arrested.

So we can't even point to, you know, something in the background where this has been done. And in fact I have come across some reports where people have dove in the water and that person wasn't arrested. I received one lately in 1993, someone driving by on a motorcycle who knew how to dive, pulled out a body, and he wasn't arrested. So we can't even set up some kind of practice to show a custom.

So we don't have a policy. But I don't want to get sidetracked on an issue of one and two say there is a policy and someone else says there isn't. I want to look at whether we've got a prevention of -- whether we've even got a legal claim, and I want to respond to what the plaintiff raised. It was sitting over here on the desk.

Prevention of a private rescue violated plaintiffs' constitutional rights. And here is where plaintiff really talks a lot about *Kallstrom* and seems to be of the opinion that *Kallstrom* establishes that somehow when you increase a risk of harm, that then you've got a constitutional deprivation. Because I'm quite sure that plaintiff is not even making the claim that any of the defendants had any part in the initial harm facing Mr. Beck of ending up off the bridge and in the water and in peril of drowning. The only harm is a supposed failure to rescue, and that is not what the situation was in *Kallstrom*.

Kallstrom dealt with dangers by private acts of violence where the state created that danger, and I'm rearguing what co-defendant argued, so I don't want to get into *Kallstrom* too much. If you've got a situation, though, where you've created a danger, you then have to show that when you created that danger, you knew that that was going

to cause a danger for a special -- for your plaintiff. I mean, it must be that specific plaintiff, which is where we've got a special relationship and your special danger.

I mean, Sheriff Haik had to know when he said, I'm announcing this policy that I'm going to arrest anyone who tries to drown, he can't know that this could create a danger for any particular person out in the public who drowns. He has to know that that's Mr. Beck. He has to know it's the specific plaintiff at issue, not just a general individual.

And the response to this argument was just that we knew or clearly should have known that plaintiff faced danger above and beyond the danger faced by the general public. Well, I don't know what that is. And I don't know how there could be any kind of danger Mr. Beck had beyond that of the general public.

When we talk about a qualified immunity, we do have cases in Michigan and from the Sixth Circuit that clearly say this right to rescue that plaintiffs are claiming doesn't state a cause of action. It's not the same facts we have in this situation, but in *Gazette* we have an argument that the police did not properly investigate, properly try to find this woman who was in a trunk. Had they found her -- had they investigated, they would have found her. They could have rescued her and saved her life. And the Sixth Circuit said no, that that does not state a constitutional claim. You still have got to find some special danger or special duty or something owed to that individual. And they don't. They don't have that.

So when we're talking about a qualified immunity issue, we have to, one, show that the law is clearly established, and I think everyone at length set forth the authority that it must be clearly established by the Supreme Court, this circuit or this court. And we don't have anything addressing this specific issue at hand, and we do have at least two cases addressing a failure to rescue type argument finding that those are not claims.

I think the last argument addressed by plaintiff involves *Lucas* and whether or not the sheriff is a policymaker for the county, and the argument under *McMillian* that the sheriff in that situation was actually a policymaker for the state because he was enforcing a criminal matter, and the county doesn't have the authority to deal with criminal matters, but it was a state policy. And I don't want to reargue any of that, but it seems that the plaintiff relied upon *Lucas* from this circuit, and *Lucas* clearly held that the policy of the sheriff is a policy of the county, and through that he's trying to bring Manistee County in.

But *McMillian* addresses that when it says while it might be easier to decide cases on a uniform national characterization for all sheriffs, it says such an approach would ignore that the states have wide authority to set up their state and local governments as they wish. *McMillian* directs us to look to the particular authority and the structure of, you know, the state and county at issue and not just apply a general rule.

While the plaintiffs relied upon *Lucas* and it seemed just made the general statement that he's a final policymaker, Manistee County in the particular area of handling drowning

incidents is about it. There is a state statute providing for body recovery giving the sheriff the duty for body recovery and to recover bodies and then the ability to charge back to the authorities for that. But, you know, that's a state statute. So any recovery, body recovery required, that's required by state law, not by county law, and frankly I'm not aware of any authority giving a county authority to direct the sheriff to recover bodies. The Court is aware that the county is a creature of statute and can exercise whatever authority it has as provided by law.

And unless the Court has any questions, I think I've addressed the issues raised by plaintiffs in their reply brief, and hopefully I've addressed the factual issues that the Court wanted me to address early on. Thank you.

THE COURT: Thank you. Thank you. Mr. Parsons, you may respond.

MR. PARSONS: Thank you, Your Honor.

Is it acceptable for me to argue from counsel table with my materials spread out or would you prefer I speak from here?

THE COURT: That's why we have podiums. They have sound systems attached to them.

MR. PARSONS: All right. It's a significant day when a civil rights plaintiff's case is put before the Court.

THE COURT: Mr. Parsons, let's get to the issue here.

MR. PARSONS: Okay. The issue is prevention of rescue. It is not a failure to rescue. The Sheriff's Department and the City need not respond to a scene. They didn't need to respond, and if they hadn't responded, Mr. Beck would be alive today.

THE COURT: Whoa. Say that again.

MR. PARSONS: If the Sheriff and the City had not responded to that scene, probable burden of proof to a probability, Mr. Beck would be alive today.

THE COURT: Now, upon what is that based?

MR. PARSONS: That's based upon the fact -- the deposition testimony of Mr. Wittig or something like that whose testimony is attached. He testified that he made the original call-in. Then he returned to the river and watched Mr. Beck struggling in the water for a period of several minutes.

Mr. Mosack, who is a Michigan State Police officer, and Mr. Cole, who is an advanced life support officer for I think Muskegon County, testified they were at the scene within five minutes after the original call. The protocol says in a cold water drowning, which this was, it's presumed that the victim survives an hour, depending upon variables. Admiral Steinman, who is the head of the Coast Guard Safety Division, said that there was a probability that Mr. Beck had a survivable incident if those divers were not prevented from going in the water.

THE COURT: Let me say it differently. I realize you're an advocate. If rescuers had gotten to Mr. Beck sooner than they did, then the likelihood of his rescue having been successful would have been an increased likelihood. Correct?

MR. PARSONS: Yes, of course. I'm not limiting my response. I'm not saying all it was was a possibility, though. I mean, I am dealing with probability.

THE COURT: Okay. But that wasn't your first statement. Your first statement said if there hadn't been a prevention of rescue, he'd be with us today or something to that effect, and that's where I stopped you.

MR. PARSONS: I'm sorry, to a probability. I mean, we can't -- I don't have a crystal ball. I can't recreate. But to a probability, according to the testimony that we have today, to a probability, he would be with us today. Not to a certainty.

Also, when his mother showed up at the scene, this is a case not just about the individual Mr. Beck's right not to have his right to life intruded upon as the *Kallstrom* case talked about, but it's the right of a family member to attempt to preserve the right of their family member, which the *Kallstrom* case also spoke to very specifically. She had a right to attempt the rescue of her child. He had a right not to have his privacy, liberty, constitutional right intruded upon.

THE COURT: Which he?

MR. PARSONS: Mr. Beck.

THE COURT: The one who drowned?

MR. PARSONS: Pardon me?

THE COURT: The one who drowned?

MR. PARSONS: Yes. So if you take -- I mean, where I believe the shocking nature of this case comes from is the quality of the proof that we have of the existence of a policy to prevent would-be rescuers. These are not happenstancers or drinking buddies. The people that have given us the most finite proof in this case are a Michigan State Police officer who says he was there within five minutes and he could have made a rescue and would have made a rescue attempt if he hadn't been prevented, and we have Sergeant Grabowski, who is the head of defendant City of Manistee's-- he's the head detective who said he saw it. He saw the written arrest policy. And he said he was shocked, and he said I assumed somebody would be killed as a result of this policy.

We have Mr. Page who is called to Michigan, and he's the risk management gentleman, he's called to Michigan to review the decision to have a policy not to provide rescue services. I'll go through these -- I'll go through these individual points.

The distinction the defense wants to make in saying *Kallstrom* is not applicable I believe is an incorrect distinction. The *Kallstrom* case pales in comparison with the facts of the *Beck* case. In *Kallstrom*, undercover officers' personnel files were turned over to distant third-party drug attorneys or attorneys for drug defendants, and the risk was so attenuated, the harm was never realized. It was the state's

intrusion upon the protected liberty interest of those undercover agents and their families, and the state didn't create the danger that they were going to get shot. The state merely --

THE COURT: Who created the danger here?

MR. PARSONS: Who created the danger? It -- well, the state compounded the danger, but the drug lords are like the water.

THE COURT: No, no, no, let's get away from that. No, come on. This is no jury case. It's your credibility. You're a lawyer. You're arguing to a lawyer. What liberty issue here do we have? Who created the danger here? Let's distinguish this from a whole line of cases about the police letting the drunk out on the road and other issues. Who created this danger? Mr. Beck did, right?

MR. PARSONS: What is the danger, the going in the water danger or --

THE COURT: Whoa, whoa, whoa.

MR. PARSONS: I'm sorry.

THE COURT: Do I have the right case? An individual in the dark of night jumped off a bridge into the water? Is this the same case that I have here?

MR. PARSONS: The fact of whether he jumped, one witness says he jumped, another witness said he struggled, other witnesses saw him trying to -- okay.

THE COURT: He fell off a bridge in the water.

MR. PARSONS: Okay, right.

THE COURT: Is there anything wrong with the bridge?

MR. PARSONS: No.

THE COURT: Oh, good. Okay, then. So the danger was initially brought upon by himself, right?

MR. PARSONS: I suppose, yes. Yes, it was.

THE COURT: Well, is there anything else, any other explanation?

MR. PARSONS: Well, the ultimate danger -- the danger is the danger of drowning. If --

THE COURT: Who created the danger of drowning, Mr. Parsons?

MR. PARSONS: Well --

THE COURT: Let's get back to the issue that's at hand here.

MR. PARSONS: All right. Your Honor --

THE COURT: The issue is the prevention of rescue. I don't want a jury argument about all the wrongs that were done here, and the *Kallstrom* case is factually very

different. He created a danger. He put himself or someone put him or the bridge did or it was a bad hair day or something, he got himself into that problem. Are you listening to me?

MR. PARSONS: Yes, I am.

THE COURT: Let's proceed from there. And frankly, I'm not so sure that someone else could have rescued him. Nighttime, as I looked at that transcript, I'm not so sure anybody could have rescued him. But there was not a quick rescue, and there was police action, there was state action intervening somehow from the time that the call was made and the people were on the shore and he was rescued.

So let's make sure, what right did he have while he was in the water that you're making reference to now? Privacy right, I believe you talked about. What is his privacy right while he was in the water?

MR. PARSONS: No right is held more -- I mean, I'm quoting from the Supreme Court. I'm not --

THE COURT: No, I'm asking you. I don't need a quote. I'm asking you what right did he have here that was violated while he was in the water?

MR. PARSONS: He had the right of his mother or private people to rescue him.

THE COURT: That's his right?

MR. PARSONS: Yes.

THE COURT: You got a case for that?

MR. PARSONS: I believe *Ross* and *Kallstrom* say that.

THE COURT: No, no. *Ross*, *Ross* didn't say that. *Ross* didn't talk about the right that the person in the water had. *Ross* talked about the arrest that was made or the arrests that were made of the would-be rescuer, if they attempted to rescue the child. That's a whole lot different than this. I mean, you're welcome to argue creatively, but please base it on the case. Come on.

MR. PARSONS: All right. So the right is the same right -- I mean, I'm not trying to upset the Court, Your Honor, so I'm not sure, I'm getting stymied where -- I'm saying the *Kallstrom* plaintiff's family's right is the same right of Mr. Beck to be free from being exposed to an increased risk of harm because of government action.

Mr. Beck went in the water, he set those events in motion, but he did not set his death in motion. There was another cause, and that is where the police -- this is not like an *Archie* case. I know the Court's aware of the *Archie* case out of the Seventh Circuit where a police officer stands, keeps people back from a car crash, the car goes up in smoke, burns the individual to death. That police officer, I think, as that court analyzed it, that police officer had no duty to go in and rescue that fellow.

But the difference is look at what the Coast Guard did in this case. If you say nobody believed that Mr. Beck could be rescued --

THE COURT: I didn't say that. I didn't say that.

MR. PARSONS: Oh, I'm sorry.

THE COURT: But I think you're arguing he was exposed to increased risk of death. I followed you. And then you went further and you talked about the fact that he wouldn't have died but for, and I'm saying I don't know where you find that from the factual development of this case. There was at best an increased likelihood of his rescue while he was alive if he had been rescued earlier, correct?

MR. PARSONS: Not at best. At --

THE COURT: He put himself at risk of death, didn't he?

MR. PARSONS: Mr. Linton and Admiral Steinman said that a survivable water incident was turned into a drowning tragedy by the conduct of the defendants.

THE COURT: That's your expert?

MR. PARSONS: Two experts, a pretty - -Admiral Steinman is a pretty well-thought-of fellow. He's saying that from a medical perspective and he's saying that from reviewing the facts of the case.

What did the Coast Guard do when they arrived? I mean, the defendants, sheriff's divers go in the water slowly, ineffectually. They put Mr. Beck in a body bag, zip it up. The

Coast Guard takes control of it, unzips the bag, and starts CPR. That's chief bosun mate Monck.

Now, that says something. They've been on the scene. The Coast Guard has been on the scene. They know the timing. They said in the deposition answers that are attached as an exhibit, we treated him as alive. We took him out, started CPR. And that is 55 minutes, approximately, after the first divers, Cole and Mosack, were prevented from going in the water.

Now, going through Ms. Olsen's arguments on behalf of Mr. Hornkohl, she made the statement there's no policy and no custom or practice to prevent rescue. Mr. Grabowski testified there is, Mr. Mosack, Mr. LaPoint, Mr. Krause, Mr. Cole. Then she turns around and she says, I got to tell you about the Vadaboncoeur incident. I've got to front that out because Mr. Parsons is going to talk about it, and I am going to talk about it because in that case Mr. Hornkohl did prevent an attempted rescue by Fred LaPoint. It was not that Fred LaPoint gave that up. That was Mr. Hornkohl who was at the scene who ordered him out of the water.

Now, what happened as a result of that incident was Mr. Krause, the private diver, later on swam in the water as his deposition says. He did go in after Hornkohl wasn't looking. He swam down, observes the gentleman sitting in his truck dead, and goes back to Hornkohl and says, I told you I could have gotten there. I got there that night. Dark, cold, one person.

That is when Hornkohl and Haik went up in smoke on this thing. He, Krause, a private citizen, had defied them.

And that starts this sequence of events which then they go ahead and start to make it a policy.

Now,, the City's decision -- I'm going in the order of Ms. Olsen's argument. She says the City's decision is rationally based. I read *Ross* as saying it is arbitrary to decide that you can deny the person in the water rescue, you can prevent their rescue based upon you saying the rescuer might be killed or injured by drowning. That's an arbitrary decision. I think that's what *Ross* said. Mr. --

THE COURT: Didn't *Ross*, though, talk about the ability of law enforcement to make rational decisions in emergency situations and make decisions which in hindsight we might look at and say why didn't they do otherwise, but there was a reason for their basis? *Ross* didn't say that they could not prohibit a volunteer from jumping in the water or rescuing anyone, did they?

MR. PARSONS: That's correct, Your Honor. But they went on --

THE COURT: They talked about the policy of arresting someone who went in the water contrary to the police instructions. That was the heart of *Ross*, wasn't it?

MR. PARSONS: That was part of it, but I think the second prong of *Ross*, *Ross* says you can make a rational decision to prevent rescue if you provide a reasonable alternative. *Ross* says if you provide a reasonable alternative.

And that's where we look at Mr. Linton's testimony, Mr. Mosack, Mr. Cole. They say, all right, if we are

prevented - - and this is my argument to the Court. If we are -- if we say the sheriff can make a rational decision to prevent others from going in, that's not the end of the story. Then he must provide a reasonable alternative and --

THE COURT: Well, we wouldn't have a real contest here if the sheriff said you can't go in and no one ever did arrive to look for Mr. Beck, would we?

MR. PARSONS: They -- well, but --

THE COURT: Excuse me. That's an easy answer, yes or no.

MR. PARSONS: If no one ever arrived? No one did arrive to try and rescue Mr. Beck.

THE COURT: I beg your pardon. Didn't someone rescue him and you're criticizing whoever rescued him for putting him in a body bag?

MR. PARSONS: Well, it seems to me that putting him in a body bag and zipping it up is not -- they had no intent to rescue him.

THE COURT: Mr. Parsons, look, I'm tired of playing games with you. I asked you a question and I asked for a straight answer. My straight question was after the private rescuers wanted to jump in the water and after these other people are told, Wait, wait, wait, rescuers are coming, rescuers eventually came, didn't they?

MR. PARSONS: Divers did come.

THE COURT: This is very difficult to get basic facts out of you, Mr. Parsons.

MR. PARSONS: Well, there's a --

THE COURT: When the rescuers came, they got the body out, didn't they?

MR. PARSONS: They did.

THE COURT: Let me go back to my what I thought was a simple question. If no, to use your term, divers had come, we would not really have a contest here, would we?

MR. PARSONS: The private divers -- I'm sorry. You're talking about the sheriff's divers or the private divers?

THE COURT: You made a statement. Back up. I hope I'm not being too difficult. It's Friday afternoon, it's been a busy week, but I hope I'm not being too difficult.

You made the statement that it would be unreasonable of the police to make a decision saying you people who are on the shore cannot engage in any rescue and then have no alternative, right?

MR. PARSONS: No reasonable alternative, yes.

THE COURT: Reasonable alternative. My point to you is, using that as your logic, if in fact no rescuers/divers had ever arrived at the scene, then we would have no difficulty saying that this was an unreasonable and arbitrary decision with no alternative, right?

MR. PARSONS: That would be unreasonable, that's correct.

THE COURT: So the question comes down to, then, did the officers and the command people present who were saying to the independent people here, Hold off, our divers are on the way, and the divers were late in getting there, was that an unreasonable alternative under the circumstances?

MR. PARSONS: Yes.

THE COURT: Is that an easy answer?

MR. PARSONS: Yes.

THE COURT: Back it up ten minutes. Suppose they had arrived ten minutes earlier. Unreasonable?

MR. PARSONS: I believe, yes, I believe so. And-

THE COURT: Fifteen minutes earlier. Unreasonable?

MR. PARSONS: I'm going to have to start referring to Admiral Linton's breakdown of the time. He sets a timing, Your Honor, and that's why I'm struggling.

THE COURT: Well, is the whole question then timing?

MR. PARSONS: No, it's partly intent. Are you--

because of the statutory distinction between recovery and rescue, we've provided the statute. There is a -- and that's why I was struggling with the Court's question before, because there is a statutory distinction between recovery and rescue. And in that case the Sheriff's Department did not make an attempt to rescue Mr. Beck, and they've admitted that. They were there for recovery, and they acted consistently by zipping him up in a body bag.

THE COURT: Well, if they had arrived earlier, let's suppose he had said, Just a minute, the diving team's on the way, and around the corner they would have come fully dressed and would have jumped off the bridge with their outfits on and gone down and engaged in recovery. Would they still have been unreasonable?

MR. PARSONS: You say immediately after Mr. Beck went in the water?

THE COURT: No, no, immediately after the officers told the private people, Hold up just a minute here, we've got a team coming. Around the corner the team would have come moments after they said that, jumped in the water, and engaged in a recovery. Would we be here today?

MR. PARSONS: Are you attaching significance to the word recovery or a rescue? I mean, because that's where we --

THE COURT: I'm giving it whatever name it implies because I'm not so fixed on the name as I am on the actions, because you have attached importance to the actions that were undertaken.

MR. PARSONS: The -- well, because every witness does who's involved in the dive. They distinguish between recovery and all those memos about recovery. If they had raced around the corner, they had engaged in recovery, and then under, as required by the statute, if they had allowed every available means to effectuate that recovery as the black letter law says, that would have been entirely reasonable because it would have effectuated a rescue, probably.

THE COURT: You've set an extremely high standard for governmental conduct, haven't you?

MR. PARSONS: In which -- in which part of my comments?

THE COURT: You said they used every available means and they've done it quickly. You set a high standard, don't you, for government?

MR. PARSONS: It's the standard set by the statute, and yes, I do. I do.

THE COURT: Okay. Continue.

MR. PARSONS: All right. The argument, Ms. Olsen's argument going to Mr. Hornkohl not actually preventing rescue because Mr. Mosack and Mr. Cole were not actually private actors, they were actually operating under Mr. Hornkohl's control, that is not accurate. They testified, both of them, that they were there privately and they were not called, they were not paid, they were not directed.

The reason why Mr. Mosack and Mr. Cole didn't go in the water was not because they were waiting for instruction from Mr. Hornkohl. It was, they said, because they were afraid of being arrested. Mr. Mosack again is a police officer, Mr. Cole a municipal employee.

Mr. Hornkohl, as Ms. Olsen said, Cole and Mosack identified themselves. He knew they were there. He knew they were divers. Why didn't they dive?

Now, this is a question that during these depositions you say -- you kind of step back, you say, Heavens, why didn't you fellows dive in? I mean, I can't imagine standing and being told. Now, that's a tough standard. Do they have to forcibly fight their way through in order to get in the water? No, they can prevent you. And this is this issue of what constitutes restraint or prevention.

THE COURT: Do you disagree with what Ms. Olsen said was told to them on that night?

MR. PARSONS: I don't disagree --

THE COURT: Not what was in their mind.

MR. PARSONS: -- to the extent of what she said that she was told. She limited it to somebody telling them to stand by. I do disagree that that was the limit of prevention.

THE COURT: What else went on?

MR. PARSONS: I think Mr. Grabowski or Mr. Krause at the scene heard Mr. Hornkohl over his radio say or somebody say to him, per Ed's -- per Ed, they don't go in.

THE COURT: Wait a minute. I don't care what somebody else said to somebody. What did the actors here do or not do?

MR. PARSONS: All right. The actors said do not go in the water. They said -- I mean, nobody knows exactly what they said because those tapes, they've dis -- the disappearing tape that we claim was spoliated evidence is no longer in existence. But they said the clear impact was they were ordered not to go in the water.

THE COURT: Well, they were told to stand by, right?

MR. PARSONS: Well, that's not -- that's not an undisputed fact. It may have been that, but they --

THE COURT: Well, tell me what was told to them. I mean, do we know?

MR. PARSONS: No, we don't, because the tape was destroyed. That was what we had the big discovery argument about. Judge Scoville has said at trial we might get a spoliation of evidence instruction on that fact. There's all the radio traffic, there are all the comments, there are all the orders going back and forth between Mr. Haik, Mr. Hornkohl, the men on the brink and the divers, and none of that is preserved except in a partial log that everybody says is inaccurate and incomplete.

So I don't know exactly what they said, Your Honor. They took it, and both of them said that, that they were prohibited from going in the water by the words and by the policy. That's what the result was.

The policy -- Ms. Olsen's next argument was that the policy was not shocking and there was no deliberate indifference, and again I cite to the testimony of Detective Sergeant Grabowski. I can tell you there is nobody clearer in the world than this 20-year detective sergeant who says he saw the policy, it said arrest rescuers. It's not Exhibit 15, even though Exhibit 15 comes close to saying that. He said-- Mr. Kaufman said, Weren't you shocked? And he said, I knew somebody -- I thought somebody was going to die.

THE COURT: Well, you told me that three times, but he's the only one who ever claims to have seen the document, right?

MR. PARSONS: The written document, yes.

THE COURT: That was a simple yes or no.

MR. PARSONS: Yes.

THE COURT: Have you served a subpoena on the department for that document?

MR. PARSONS: Yes.

THE COURT: Have you gotten a response?

MR. PARSONS: Yes. They have not got it.

THE COURT: So have you asked any other people if they've ever seen a written document?

MR. PARSONS: I think we've asked, yes.

THE COURT: What have all the rest of them said?

MR. PARSONS: I can't -- I can't tell the Court. I don't know. I can't -- they know the policy. I mean, you want me to answer the written policy. I can't remember what they said about the written document. They said they knew the policy existed.

Until Detective Grabowski, it wasn't clear that it was different than the crime scene document. We went a fair way through this case, I was assuming, like the defendants are arguing, that the document says all -- that sheriff's divers and all others will treat it -- will be made aware or will treat it like a crime scene. When we got to Mr. Grabowski's deposition, I showed him that exhibit, Exhibit 15 which is attached, and I said, Is this what you mean? He said, No. He said, No, that's not the document I mean. And at that time, then, we've got half of the case under our belt. So it wasn't -- we couldn't follow it with great specificity with each deponent because I assumed the crime scene document was what they were talking about until he said that.

THE COURT: But a crime scene -- if in fact a rescue area, recovery area, whatever you want to call it, is treated as a crime scene, it's rather obvious that a crime scene gives the officers the ability to control that area and to make arrests on anyone who contravenes their instructions, doesn't

it, as being obstructing a police officer in the exercise of their duties?

MR. PARSONS: Yes.

THE COURT: Pretty obvious, isn't it?

MR. PARSONS: Yes. The issue of whether it was a clearly established law that sheriffs could not prevent the rescue by private individuals Ms. Olsen says was not clearly established.

THE COURT: Have you had occasion to review *Rogers v. City of Port Huron*?

MR. PARSONS: Yes, I have.

THE COURT: What is your take on that? That's close, isn't it, to this one?

MR. PARSONS: Yes.

THE COURT: Is it distinguishable?

MR. PARSONS: Yes, because it's not what I think the prevailing federal law is. Prevailing federal law --

THE COURT: Let me ask you another way. Is *Rogers v. City of Port Huron* wrongly decided? I mean, if it is, it is. I mean, you know --

MR. PARSONS: I -- I can't go through the particularities of the case. I accept it. You know, I'm an officer of the Court and I accept the --

THE COURT: No, no, that's an Eastern District decision, Judge Duggan's decision in the Eastern District.

MR. PARSONS: Oh, I'm sorry.

THE COURT: And he said this. He's quoting *Jackson v. City of Joliet* and he's quoting at 833 F. Supp. 1212 at 1220: "If the defendants deprived the plaintiffs' decedents of anything it was some right of competent rescue services. But, as we have been at pains to stress, there is no such right in the Fourteenth Amendment." And he proceeds to --

MR. PARSONS: I -- I'm sorry. I agree with that, right.

THE COURT: And Judge Duggan appears to differentiate *Ross v. United States*, and under *Ross* he says: "The lesson of *Ross* is that an officer cannot 'arbitrarily assert his power to cut short a person's life.'"

MR. PARSONS: Okay. And, Your Honor, you will recall at the original status conference, the Rule 16 conference, the defendants cast this case as a *Rogers* case, as a failure to rescue. And Your Honor correctly said if that's the case, then let's go forward with the dispositive motions.

And that's where I've taken pains to try and point out we're not saying the police officers failed to rescue Mr. Beck. It's not in the pleadings and it's not in my argument and it's not in my head. I'm saying they prevented private rescuers and they prevented a mother from rescuing her child. It's a prevention, not a failure to provide something. It's the difference between misfeasance and nonfeasance.

THE COURT: But, see, I don't want to argue *Rogers* with you, but *Rogers* goes further. It says: "Plaintiffs cannot establish that Officers Reid and Malott violated a clear constitutional right in preventing private citizens from rescuing Decedent in light of conflicting opinions within the circuit addressing this issue."

And they go into some detail concerning the fact that this is not an area of law that is clearly defined under governmental immunity and that in fact the officers had the ability to determine the level of safety and skills of not only the rescuers, but of the police, the private citizens and everyone else, as well as the behavior of the person who in this case had come off the top of the bridge. They had the right to evaluate the entirety of the circumstances as part of their discretionary function. That's a pretty high hurdle that you have to overcome in this case, isn't it?

MR. PARSONS: But doesn't that presuppose in *Rogers* if you've got a Mosack and Cole, certified underwater rescuers, that if there's a duty or if there's a right to evaluate, don't you treat Mosack and Cole as qualified? They're more qualified than the fellows that went in the water. And then -- that's as to Mr. Beck. But then that ultimate question, doesn't Mrs. Beck have her separate right, whether it's that

superhuman effort, she has a separate right to try to rescue her other family --

THE COURT: No, that's an easy one to make. That's one made every day by firemen. Child is in a burning house, mother says, I'm going to get him. What does the fireman do? What do they always do?

MR. PARSONS: It's certain death. She can't go in.

THE COURT: Right.

MR. PARSONS: They restrain her.

THE COURT: They restrain her.

MR. PARSONS: But not in water, not when she--

THE COURT: Late at night, Manistee River, it's dark, there's a current. You can't argue that --

MR. PARSONS: Husband lifts a caf off a wife who's trapped underneath. It doesn't make sense, but it happens.

THE COURT: Yeah, but you can't fault the officer for -- this is an easy one for me. You can't fault the officer for restraining the mother when he has no idea of her fitness to even swim or anything else under those circumstances. She's emotionally distraught. This is very synonymous to a mother returning into a burning house in my mind, but go ahead and argue further.

I've given you a lot of tough questions here because I want to see where you're -- I want to be able to flesh out right where you're coming from. Please continue.

MR. PARSONS: Right. On that point, though, it seems in the broad statement of *Kallstrom* at 1062 that it's a fundamental liberty interest for a family member in preserving their lives and the lives of their family members. I think if firemen are on the scene and handling a fire and a woman wants or a person wants to run into a burning building to certain death, they're in control, they're battling the blaze or the damages done.

I think normally that is not the case, and it certainly wasn't the case here. The damage was not done. Beck wasn't dead. Just that way we test our gut when we see a case, when we hear a case and you say as a parent, somebody says they wouldn't let me even attempt to rescue my child. It seems that is almost by definition shocking to the conscience. You cannot walk on the street and tell this case to somebody without them saying, Oh, my God. You have two trained rescuers, you have a mother who are forced to stand at the scene for about 50, 55 minutes before somebody goes out and puts the victim -- goes right to where the victim is known to be, picks him up, puts him in a body bag.

Now I'll move, I think, to the Haik and the Manistee argument. Many of the arguments are subsumed within my previous argument. What I wish to draw attention to, Your Honor, is this statement Haik was not at the scene until it was too late.

There has been an extraordinary dispute in this case about spoliation of evidence concerning a 911 tape that Cheryl Griffin says was erased or recycled under very suspicious circumstances, and we have the document on which she ordered it to be saved says "cut tape."

And Mr. Haik, not being at the scene in person, is not necessary. If he is ordering others to prevent the divers whom he detests from going in the water, he is at the scene. He is sufficiently at the scene and acting sufficiently under color of law, color of authority. And those missing tapes, that's why they're important. And that's why if the Court or the trier of fact were to hear the circumstances under which that tape, which would have every actor, they would have the missing comment, everybody knows exists, he's going down for the count. That callous, deliberate indifference to a specific individual, Eugene Beck, known by name, he's going down for the count, and there would be Ed Haik there on that tape.

And there isn't Ed Haik, but that is because the defense destroyed that evidence. It was within their control. An attorney by the name of Springstead requested it be preserved. The 911 director, Ms. Griffin, wrote that it should be cut. She wrote "cut tape." It should have been preserved. There was a fax, there was a phone call, and there was a follow-up letter requesting the preservation of that evidence by an attorney for the Becks, and the evidence was destroyed.

The presumption, therefore, should fall. We're in this area of the *Chipollini* and the *White's Landing* case where, when there is evidence that discovery is being abused to the detriment of a party or the prejudice of a party, Rule 56 relief should not be granted for the obvious reason. Under Rule 56

the inference is the plaintiffs'. We are granted a favorable review of the facts and the inferences.

The crime scene memo says others shall not intrude. There is an inference regarding the missing evidence in this case, and that would put Mr. Haik at the scene and it would show him giving orders. And the fact that it was destroyed should be held against the defense. It should not limit the plaintiffs' rights.

The argument Ms. Jasinski goes to, number three that I have in my notes, Mr. Haik did not prevent Sharon. Technically, there is no proof that Mr. Haik physically forcibly prevented Sharon Beck from going in the water. Mr. LaPoint, the city fireman, did, effectuating Mr. Haik's policy.

Mr. LaPoint says then when I left, Rescue 5-A was dismissed from the scene very quickly. While Beck under all protocols was presumably still alive, Rescue 5-A, which is the only advanced support on the scene, is sent away by Mr. Hornkohl because he knows they're not doing rescue. And Mr. LaPoint said when I left, when I was ordered from the scene with my rescue unit, I turned Ms. Beck over to other officers. He didn't remember who. By then the scene is flooded. If Mr. Haik didn't physically forcibly prevent Sharon, officers, I don't know if they are sheriff's or other city officers, did. Mr. LaPoint was a city officer.

They say Mr. Haik did not prevent private divers. We don't have the policy. Well, again, if Mr. Grabowski says Exhibit 15 doesn't go far enough, it's not the strictest written policy of arrest, that's a factual dispute. Put this 20-year, 25-

year detective sergeant on the stand then and say, Did we have the policy, and the trier of fact should decide that.

For purposes of this motion we know there was a policy because disputed facts are again decided for the plaintiff. We haven't seen the policy in writing, no, because he said it disappeared. But the existence of supporting documents establishing that there was a policy not to provide rescue services and to affirmatively say we should not provide rescue services includes Mr. Page's memo from the risk manager and Exhibit 15, the inferences, police officers and all others will be told this is a crime scene, and the understanding of virtually every officer who has been deposed in this case.

Ms. Jasinski goes on to say there's no custom and practice. I would say again the Vadaboncoeur incident, he was death number one. Beck is death number two, and the conduct of the sheriff's team that night was understood to be recovery, not rescue, by all formal distinctions that are -- I mean, that's a term of art, rescue versus recovery. The custom and practice was not to do rescue. It was to pick up people who are dead and put them in a body bag.

Then finally, Ms. Jasinski's argument that the sheriff was not a policymaker. The reason the opinion in *McMillian* makes sense is they said under I think it was Alabama law, we leave it to the localities to decide whether or not the sheriff is a policymaker. And the Sixth Circuit has decided that issue the same way, basically, saying under Michigan law the sheriff is the final policymaker.

And if you're looking for whether or not there was a formal policy as well as a custom or practice, Page and then

the Grabowski document, which says on its face as of 1994, we no longer have the resources to guarantee a rescue effort will be made, there was a huge dispute during that deposition what he meant by effort. I look at it as -- I took him at his word in that document. He says no rescue effort will be made. No attempt will be made. The defense looks at it to say they can't guarantee a successful rescue.

Your Honor, I sense from your questions and your very close attention to detail that I've somewhat -- I've disappointed or aggravated you because I --

THE COURT: Mr. Parsons, you're a professional. I've asked you some questions. I think you dodged some questions. Does it mean I'm aggravated with you, does it mean I'm angry with you, does it mean I've formed an opinion? Absolutely not. If I didn't think you were a good lawyer, I wouldn't waste my time asking you questions.

MR. PARSONS: All right. I appreciate that, Your Honor.

THE COURT: Let's be professional here. You're in federal court. And I do this to lawyers from all over the United States, look them right in the eye, I ask them tough questions. I ask tough questions, at least in my mind. Maybe they don't look like tough questions to you. Maybe they look like off-the-wall questions to you, but that's irrelevant. I need answers and I need straight answers.

Anything further?

MR. PARSONS: No. I appreciate your time, Your Honor, thank you.

THE COURT: Okay, thank you. Let's just take a short break and then we'll see if the defendants' counsels want to briefly respond.

(Proceedings recessed at 3:27 p.m.; reconvened at 3:43 p.m.)

THE COURT: Back on the record. Counsel for the defendants may respond briefly to the plaintiffs' counsel's arguments in this matter. You may proceed, Ms. Olsen.

MS. OLSEN: Thank you, Your Honor. I will be very, very brief, and I really just need to respond to some of the what I perceive to be absolute factual inaccuracies that Mr. Parsons made.

First off, he testified -- not testified, I'm sorry, he argued that if the sheriff and city had not responded, Beck would be alive, and you certainly questioned him on that proposition. But he did so based on his assertion that Cole and Mosack testified they were at the scene within five minutes.

That's an absolute inaccurate statement, Your Honor. If in fact they were there within five minutes, according to plaintiffs' own assertion of the facts, they would have been there when Beck was still in the water struggling. And we know that that wasn't true according to their testimony.

Cole testified he was there shortly after the call. He wasn't certain exactly when. Mosack in fact didn't arrive until much later. And we know that because once the two of them

arrived, keeping in mind that you have to have two officers to do anything, they knew they couldn't -- two officers, I'm referring to them as MSRDT, they knew they couldn't go in the water without two men, and that's per their own protocol.

Once the two of them arrived, they called 911. And we know from the log that call didn't happen until 10:38. So we're not talking about the two of them being there within five minutes of the incident by any means.

Now, this statement that if the sheriff and city hadn't responded, that Beck would be alive, you commented it's a huge leap based on absolutely nothing. In fact, both Cole and Mosack, the divers that were there, testified they had no idea if they could have recovered, much less rescued, Beck. So that is a gigantic leap that we made.

Now, Mr. Parsons also said that the Sheriff Department team made no effort at rescue, only recovery. I have no clue where he got that from because that is not supported by the testimony. Every one of the sheriff divers were asked, Were you responding to this as a rescue situation? Absolutely yes, their response was.

THE COURT: But didn't they refer to it as a recovery team?

MS. OLSEN: They referred to themselves as a recovery team, yes, they did.

THE COURT: In order to be able, then, to not be cast in the light of saying when we go out, we bring in our people alive.

MS. OLSEN: Right, not being bound by that huge burden of rescue.

THE COURT: There's an expectation.

MS. OLSEN: Yes, that's exactly right. Because I definitely questioned Sheriff Haik on that principle. You represent yourself as a recovery team. At the same time, is it your intention to perform a rescue on every incident? Absolutely yes, he said. That is our goal.

Now, the other point that I wanted to make was you asked, What did Hornkohl say to Cole and Mosack? And Mr. Parsons quibbled with my representation. According to Mosack's testimony on Page 10, he said, quote: "We were told that we were just to stand by. We were told to stand by and that they were toning out the sheriff dive team, and that if we were needed, they would let us know." This is the testimony.

And then he said -- the reason I think I said he was quibbling was we don't know what was said because of this disappearing tape. Somehow we always get back to this disappearing tape as if it's the culprit for everything. Clearly any conversation between Cole, Mosack and Hornkohl wouldn't have been on any 911 tape. If they talked to Hornkohl down at the staging area, I don't know how that would have been on a 911 tape. That wouldn't have told us anything.

Unless the Court has any other questions.

THE COURT: Thank you.

MS. OLSEN: Thank you.

THE COURT: Thank you.

Ms. Jasinski?

MS. JASINSKI: Like I said, I always get nervous when we have all these factual assertions that aren't backed up and I don't like to spend time on them.

I want to point out that Sheriff Haik testified, I never talked to Mr. Hornkohl, and Mr. Hornkohl testified, I never talked to Sheriff Haik that evening. So whoever we have saying that they think they heard someone say something can really have no bearing.

I followed very carefully -- I tried to follow very carefully what exactly is the claim that we have here. And I believe the claim is no, the police didn't create the initial problem, but if they hadn't stopped these rescuers from going in, Mr. Beck would be here, and however long he was deprived of oxygen, he would be just fine.

I think that was addressed in the *Port Huron* case and that has been addressed by the Sixth Circuit where the claim was made that specifically, does that claim that the defendants had a special relationship with Bandy because the police officers had made Bandy's situation much worse by their actions and inactions, that we made the situation worse. And I think that's what claim we have here is that the police by preventing private rescuers from going in made the situation worse, and in 1994 the Sixth Circuit said this does not state a 1983 claim.

Your Honor, the rest of my notes really deal with factual allegations about zipping him up in a body bag, which wasn't -- the gentleman was put in a body bag because you have to pull the body out of the water and hand him over the boat to somebody and it's very difficult to control that. And I believe Mr. Parsons was there when the deputy who did that explained to him the reasons for doing that. It wasn't because we were going to zip him up in a body bag and, well, here he is, we're done, here's your body bag. He was put in a body bag because it's very difficult to get a body out of the water which is lifeless and hand it over. And he needed something to help him facilitate for the people on the boat to grab so the people could grab that body bag to bring the body up.

So as far as I know, we were all in the same deposition, so it really is difficult for me to listen to this, you know, zipped up in a body bag. And I don't mean to get caught up in these types of things, but it is hard to hear that there was no -- the intent was not to have a rescue, because I sat through the deposition of Deputy Cermak who was the diver who found the body on the bottom of the river who testified about that he was in emergency mode to get there and testified to all his actions that evening to find that body and that it was emergency mode and they were acting as quickly as possible and the procedures they'd gone through in practice to be able to do this.

So to the extent that there's some claim that there was no reasonable alternative, that's just simply not the case. That it might not have been quick enough doesn't not make it a reasonable alternative.

And again, making the situation worse, especially when we have no special relationship, is not a 1983 cause of action in this circuit. And unless the Court has any questions.

THE COURT: No.

MS. JASINSKI: Thank you.

THE COURT: Thank you.

Let me ask you, both counsel for the defendants, what is the status -- status is the proper term I want to use here -- for any disposition of settlement in this case? Can I be informed as to where you are from the defendants' viewpoint on this issue? I'm looking at you, Ms. Olsen. I just have to look at somebody.

MS. OLSEN: Let me make sure I understand the question, Your Honor, before I respond. What's the status of settlement negotiations?

THE COURT: Right. Are they ongoing, have they stopped, are you talking, are you not talking, have you--

MS. OLSEN: We are not talking at this point because of the mediation. Mediation has been held and the time hasn't run yet because the Court's going to sign the stipulation allowing Mr. Parsons some additional time. So I suspect that until --

THE COURT: Has there been an acceptance or rejection or has there been neither at this point from anyone?

MS. OLSEN: There has been neither at this point. And that's the purpose for the stipulation was to extend that time so that Mr. Parsons could get an allocation amongst his separate plaintiffs, the estate and Mrs. Beck, which was not done because the fee wasn't paid to do that.

THE COURT: Okay. I guess the other question is may I presume from what you're saying that your clients, both of your clients, Ms. Olsen's and Ms. Jasinski's clients, are amenable to a continued discussion concerning mediation and settlement if the figure is right?

Let me say Wal-Mart is famous in this court because Wal-Mart won't settle anything, and you get a Wal-Mart case and you don't even talk about settlement because it's Wal-Mart in Bentonville. I brought this southern lady up here and she just looked at me and says N-O. So we are not Wal-Mart?

MS. OLSEN: I don't think we are Wal-Mart, Your Honor. I don't want to speak for Ms. Jasinski and her clients, but --

THE COURT: There has been discussion between and among you. Is that a fair assessment?

MS. OLSEN: There really hasn't been just because we never really got any kind of a number from Mr. Parsons. So he wrote a letter before mediation and said I would like to resolve the case, but never gave us a number. So we went to mediation. We now have a number. We haven't made our decisions whether we're going to respond positively and accept that or not at this point.

THE COURT: Okay. Ms. Jasinski, that's a fair assessment of where you are?

MS. JASINSKI: Right. I recall a letter and I recall a suggestion as to what the settlement demand may be, but nothing more than how many figures it was, and I think that was a suggestion of how many figures it would be, and it wasn't anything that at that point generated settlement discussions.

THE COURT: Okay. Okay.

Mr. Parsons, you know more than I do about this situation.

MR. PARSONS: No, they're very accurate.

THE COURT: All right, okay. Very good.

All right. Thank you, all of you. Matter is under advisement. I'll write on it as quickly as I can. I've got to go back and look at a few more of these cases in light of some things that were brought up today, and I'll try and get right back with you. Thank you. (Proceedings concluded at 3:57 p.m.)

CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings

had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/_____
Kevin W. Gaugier CSR-3065
U.S. District Court Reporter
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APPENDIX F

UNITED STATES CODE ANNOTATED CONSTITUTION OF THE UNITED STATES AMENDMENT XIV -- CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAR 22 2001
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(2)

No. 00-1170

In The

Supreme Court of the United States

ROBERT C. HORNKOHL and CITY OF MANISTEE,

Petitioners,

vs.

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE CONCLUSION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT A POLICY OF THE GOVERNMENTAL DEFENDANTS, WHO HAD NO "RESCUE" TEAM, TO ARREST AND INCARCERATE SKILLED PRIVATE DIVERS IF THEY ATTEMPTED TO SAVE THE LIFE OF A PERSON IN IMMINENT DANGER OF DROWNING, THEREBY AFFIRMATIVELY PREVENTING RESCUE, IS VIOLATIVE OF FOURTEENTH AMENDMENT PROTECTIONS.

PARTIES TO PROCEEDINGS

Respondent

Respondent GALEN BECK is the Personal Representative of the Estate of Eugene Beck, whose death was allegedly caused by the unconstitutional policy addressed by the decision of the Court of Appeals for the Sixth Circuit (1a-21a). SHARON BECK is the mother of the decedent. She was physically restrained from attempting to rescue her drowning son. Although the claims of SHARON BECK have been dismissed by the decision of the Court of Appeals (17a), Petitioners have nonetheless identified her as a Respondent in the caption of their Petition, but have not addressed the substance of her claims in their Petition or explained what additional relief they ask this Court to grant them against SHARON BECK.

County of Manistee and Sheriff Haik

The COUNTY OF MANISTEE and its Sheriff, EDWARD HAIK, were co-Defendants of Petitioners in the underlying action. The Court of Appeals upheld summary judgment for Sheriff Haik on qualified immunity grounds (15a-16a). That Court reversed summary judgment for the County, holding that facts developed in discovery were sufficient to show a "policy" (as that term is defined by jurisprudence arising under 42 U.S.C. § 1983) which violated the Fourteenth Amendment rights of the deceased (8a-12a). The County has not sought review of that decision.

PARTIES TO THE PROCEEDINGS - Continued

Petitioners

Petitioner CITY OF MANISTEE has sought review of a similar ruling by which the appellate court reversed the summary judgment which the District Court granted to it (12a-15a). ROBERT C. HORNKOHL, the Director of Public Safety for the City, prevailed on summary judgment, with the Court of Appeals holding that he was protected from § 1983 liability by qualified immunity (15a-16a). Despite having prevailed below, he has joined in the Petition for Writ of Certiorari.

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THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE CONCLUSION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT A POLICY OF THE GOVERNMENTAL DEFENDANTS, WHO HAD NO "RESCUE" TEAMS, TO ARREST AND INCARCERATE SKILLED PRIVATE DIVERS IF THEY ATTEMPTED TO SAVE THE LIFE OF A PERSON IN IMMINENT DANGER OF DROWNING, THEREBY AFFIRMATIVELY PRE-VENTING RESCUE, IS VIOLATIVE OF FOURTEENTH AMENDMENT PROTECTIONS 16

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OPINIONS BELOW

The Opinions of the District Court (24a-50a to the Petition) and United States Court of Appeals for the Sixth Circuit (1a-21a) are both unreported.

BASIS FOR JURISDICTION

Respondents acknowledge, as Petitioners assert, that the Petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The right which Respondents are alleged to have violated is rooted in the Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law". The arrest policy involved in this case also implicates the Fourth Amendment (applicable to the States under the Fourteenth), which states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CONCISE STATEMENT OF THE CASE

1. Introduction

On January 28, 1995, Plaintiff's decedent,[1] Eugene Beck, fell[2] into the Manistee River in Manistee, Michigan. Within minutes, two highly experienced divers arrived at the scene, fully equipped and prepared to rescue Mr. Beck. However, the City of Manistee (by its Chief of Police, Robert Hornkohl), and the County of Manistee (by Sheriff Haik) had adopted the policy that every non-governmental diver who sought to rescue anyone drowning would be subject to arrest. The City's Detective Sergeant has candidly described that policy, "I am sure having that kind of policy would result in the loss of life". The death of Mr. Beck which resulted from that policy is the subject of this case.

2. The History And Nature Of The Policy To Arrest Private Rescuers

Prior to 1993, there had been three incidents of drowning or near drowning in the Manistee area, all within a relatively short time [Mosak dep., pp. 45-47; R.

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[1] Suit was filed in the name of both the decedent's Estate and Sharon Beck, the decedent's mother. For present purposes, the singular term, "Plaintiff", refers to Eugene Beck, the decedent, or his Estate. The term "Defendants" refers to those sued in the District Court without regard to whether they are Petitioners in this Court.

[2] As the District Court noted [Opinion (R. 188), p. 4, fn. 4], there is some dispute whether the decedent fell, jumped, or was pushed into the water, but this disagreement is immaterial to the legal issues presented.

109, Ex. P].[3] In 1993, a man named Mr. Vadaboncouer drowned in the Manistee River (Krause dep., pp. 4-5; Ex. A). On that occasion, Mr. Krause, a friend of Vadaboncouer, arrived at the scene. Mr. Krause had 20 years of underwater diving experience, was certified in open water diving and advanced diving, and held a CPR license (Krause dep., p. 5). When Krause arrived, City Chief Hornkohl told him he was not allowed to enter the water to save his friend (Krause dep., pp. 6-7). As a result, Vadaboncouer died.

The inadequacy of available rescue services led to a public controversy. In early 1993, the City and County began efforts to review their rescue and recovery practices. The outgrowth was that ***neither*** would provide "rescue" services (the attempt to save the life of one in imminent danger of death by drowning).

By January 14, 1993, the City established that, "Due to the current man-power situation, and because of liability, training, and equipment concerns", the City would not provide "Underwater Rescue/Diving services" (Ex. D). That policy remained in effect at the time of the Beck drowning.

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[3] Exhibit references identify attachments to Plaintiffs' Brief in Reply to the Summary Judgment Motions of the City and Hornkohl [R. 109] and those of Haik and the County [R. 164]. The Exhibits are lettered sequentially; *i.e.* R. 109, Exs. A-T; R. 164, Exs. U-EE). Where the referenced Exhibits are those attached to the City/Hornkohl Brief [R. 60] or the County/Haik Brief [R. 123], they will be referred to as "City Ex. ___" or "County Ex. ___" respectively.

By this time, the City had a "Cold Water Rescue Team" (City Ex. A), comprised exclusively of City employees (¶ 5, p. 2), who "shall not dive under any circumstances" (¶ 2, p. 1). Rather, once the victim "is no longer visible", the Sheriff's team was to be notified, "to stand by in case the victim submerges under the water or below the ice" (*Id.*).

The County read Michigan law[4] as requiring only "recovery" services (pulling dead bodies out of the water), not "rescue" services (saving living people in peril) (Ex. H; Lamunyon dep., p. 22). To avoid what it perceived would be liability exposure, the County decided to confine its activities to "recovery" (Exs. E, F).

Mr. Krause, spurred by the death of his friend, Mr. Vadaboncouer, established the Manistee Search and Rescue Dive Team ("MSRDT") to fill the need for rescue services. This team was consisted of civilian volunteers, experienced in diving and rescue operations (Mosack dep., p. 7). Other members of the MSRDT, besides Mr. Krause, included Fred LaPoint, Michael Mosack and Gordon Cole.

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[4] The operant Michigan statute, M.C.L.A. 51.301, provides:

> "In case any person is drowned in waters within the corporate limits of any city, it shall be the duty of the chief of police of said city, and in case any person is drowned in waters outside the corporate limits of a city, it shall be the duty of the sheriff of the county within which such waters are situated, to use every available means in the recovery of any such body. . . . "

Despite widespread community support for the MSRDT, Sheriff Haik was adamantly opposed to it (Ex. H, Lamunyon dep., pp. 24-25, 39-48). The Sheriff announced that every water scene was considered a "crime scene" (Lamunyon dep., p. 23). He viewed civilian rescue attempts as "interfering in a crime scene", a view that was commonly known to MSRDT members (Lamunyon dep., pp. 23, 39). At several city council meetings, which were typically televised locally, Haik announced that MSRDT members who undertook rescue operations would be criminally prosecuted and jailed (Lamunyon dep., pp. 24, 39, 45, 47, 48, 55-56, 58). This position was formalized by a written document. In this memorandum, from Sheriff Haik to volunteer fire chiefs in the area:[5]

> " . . . Mr. Haik declared that any water accident scene was a crime scene and that if members of the Manistee Search and Rescue Dive Team showed up and attempted to go into the water in an effort to attempt to rescue a person that we would be placed under arrest for impeding a police operation" (LaPoint dep., pp. 132-133).

The City's Detective Sergeant James Grabowski, a former good friend of Haik, was also aware of a memorandum from the Sheriff (Ex. K, Grabowski dep., pp. 24, 49). This document provided that, "anybody entering the water is considered a crime scene and they could – are subject to arrest" (Grabowski dep., p. 44). The witness

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[5] Despite repeated requests, Defendants would not provide this writing during discovery. Although they claim it never existed, when Mr. LaPoint asked for a copy from the Chief of a nearby volunteer fire department, the Chief told him he had a copy and would provide it (LaPoint dep., p. 134).

knew that, "having that kind of policy would result in the loss of life" (*Id.*, p. 48).

The threat to arrest anyone attempting a rescue was directed especially to MSRDT members. It was common knowledge that MSRDT members would be arrested for attempting a rescue (Lamunyon dep., pp. 39-41), because, in Sheriff Haik's view, that would be "stepping on [his] toes" (Mosack dep., p. 48).

To summarize the practice: the City would perform no diving or rescue operations. The County would provide only "recovery" assistance. MSRDT members who attempted a rescue, no matter what the circumstances, would be subject to arrest.

3. The Recognized Time Frame For Rescuing Or Resuscitating Drowning Victims

It is nationally recognized that a drowning victim can be resuscitated for between 45 minutes and an hour after he is submerged (Krause dep., pp. 57-58). To succeed in a rescue, it is necessary to get the victim out of the water within "the golden hour" (*Id.*; Mosack dep., p. 21; LaPoint dep., p. 66).

Respondents presented to the District Court the opinion letter of Dr. Alan Steinman, former Director of Health and Safety for the U.S. Coast Guard, together with scholarly writings on the subject (Ex. AA). The factors in this case favored a successful resuscitation within the one hour period (*Id.*, pp. 1-2).

4. The Drowning Of Eugene Beck

Another man, Mark Stander, and Mr. Beck left the bridge at about 10:07 p.m. Mr. Witting, who saw this as he was driving by, continued to a business around the corner, where he called 911 (Ex. Y, Witting dep., pp. 28-30). Beck was near the middle of the river, illuminated by the parking lot lights of a nearby store (*Id.*, pp. 9, 31), about 100 feet from the shore. The decedent was treading water and yelling to another man (*Id.*). After making the 911 call, Witting went outside, and heard the decedent's yelling continue (*Id.*, p. 30).

Two City police officers, Lindeman and Stuckum, arrived within about 2 minutes of the EMS call (Witting dep., p. 31; City Ex. C, Stockman dep., p. 5). They went to the bridge, and Stuckum arrested Stander as he came out of the water (Stuckum dep., pp. 6-7; City Ex. D, Lindeman dep., p. 13).

Meanwhile, a fisherman advised Lindeman that there was a second man (later identified as Beck) in the water (Lindeman dep., pp. 13-14). Lindeman saw Beck's body in the water. According to the dispatch log,[6] at 10:17

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[6] The Central Dispatch Director, Ms. Griffin, ordered that the taped dispatch transmission regarding the Beck incident be saved (Ex. M, Griffin dep., p. 43). In addition, the City received a request under the Michigan Freedom of Information Act (*Id.*, p. 44). Despite Ms. Griffin's order, a City employee recorded over the original tape. Since no copy was made, the exact contemporaneous communication by Lindeman has been destroyed. In addition, there is considerable doubt about the accuracy of the log, since the times do not coincide with witness testimony and since the log omits communications which witnesses overheard.

Lindeman reported that he "saw the subject go under and not resurface" (*Id.*, p. 14).

Meanwhile, MSRDT members Cole and Mosack overheard the transmissions. Cole went to the scene with his rescue equipment and dive suit within 5 minutes of hearing the Lindeman transmission (Ex. O, Cole Affidavit). Mosack got his equipment, and arrived 6 minutes after hearing a transmission that the man was seen on the surface (Mosack dep., p. 27). He donned his diving equipment within the first minute of arrival (Mosack dep., pp. 22-23). Thus, both civilian divers were ready to begin the rescue operation by 10:24, seven minutes after Lindeman had reported seeing Beck go under. This is confirmed by Mr. LaPoint, who arrived at 10:20 p.m., and saw Mosack and Cole in their wet suits with their equipment at hand five minutes later (LaPoint dep., pp. 62-63).

The U.S. Coast Guard station in Manistee "primarily responds to rescue operations", because "the difference between the rescue of a cold water near drowning victim and a body recovery is the timely notification of available rescue agencies" (Ex. T). It was able to respond to the Beck death scene within two minutes of notification (*Id.*). However, it was not contacted because the City's policy under Haik was not to call the Coast Guard (Griffin dep., pp. 47-49).

Meanwhile, at 10:18 p.m., Lindeman or Stuckum requested that Chief Hornkohl be notified (City Ex. G,

Hornkohl dep., p. 44). The Chief arrived in about 5 minutes (*Id.*); at the time of, or just prior to, the arrival of Cole and Mosack.[7]

Central dispatch had notified the "R5" unit at the City's fire station (Hornkohl dep., pp. 45-46). This unit was manned by Mr. Janowiak and by Mr. LaPoint, a member of the MSRDT.[8] The R5 unit is the medical emergency vehicle which carries specialized water rescue and extraction equipment, as well as the most advanced resuscitation equipment in the City (LaPoint dep., pp. 42-43). Shortly after arriving, Chief Hornkohl ordered LaPoint and the R5 vehicle to leave the scene, where there was no other known resuscitation equipment, expecting to summon R5 only after the body was recovered (Hornkohl dep., pp. 44-48). This was because the City's policy was not to have a dive team and not to allow fire department personnel to dive (*Id.*, pp. 97-99). By now, 20 minutes of the "golden hour" had expired and Mosack and Cole remained ready to act.

The City's policy was not to permit MSRDT to attempt to rescue without Haik's approval. However, Haik was not notified until 10:40 p.m., over one-half hour after Beck entered the water, and more than 15 minutes after Mosack and Cole were prepared to rescue Beck. Haik did not arrive at the scene until 11:00 p.m. (City Ex. F, Haik dep., p. 9, 25). The Sheriff's county divers did not

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[7] Other testimony indicated that Hornkohl did not arrive until 10:31.

[8] LaPoint did not arrive in the R5 vehicle with his diving equipment, but the equipment was in his car, parked at the fire station six blocks away (LaPoint dep., p. 41).

enter the water until 11:05 p.m., about one hour after the initial report (*Id.*, p. 9).[9] Within 14 minutes of entering the water, these divers recovered Beck's body "pretty much below the last seen point" (*Id.*, p. 20; City Ex. B, Kowalkowski dep., pp. 69-70). Apparently believing that resuscitation was still possible, a Coast Guard officer, Mr. Monck, attempted CPR, but these efforts were too late to be successful.

5. Governmental Prevention Of Timely Private Rescue Attempts

Mosack and Cole arrived within a minute or so of each other, no more than seven minutes after the report that the man had been observed going down (Mosack dep., pp. 27-30; Cole dep., p. 21; Cole Affidavit, ¶ 4). They learned where Beck had last been seen and were directed by a police officer to talk to Hornkohl (Mosack dep., pp. 10, 29). They told Chief Hornkohl that they were ready to go in the water (Mosack dep., p. 10).[10] Hornkohl called Sheriff Haik, then announced, "I need you to stand

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[9] According to the log, Mr. Cermack, the County diver, had no contact with central dispatch until 10:31, twenty-four minutes after the original 911 call (Ex. K, Cermack dep., p. 6). The log (Ex. B) reflects that at 10:30, "The County Dive Team Started To Be Called In". When Cermack first heard the dispatch, he was on patrol, without his equipment, 20 miles away (*Id.*, pp. 4-5).

[10] Hornkohl claims he was unaware of any dive team member at the scene (City Ex. G, Hornkohl dep., p. 52), and Cole could not recall talking to Hornkohl. However, other witnesses observed Hornkohl speak with MSRDT members (Grabowski dep., p. 20).

by. Per Sheriff Haik, you're not to go in the water" (Mosack dep., pp. 37-38), and that the Sheriff's department was being notified that they were just to stand by (Mosack dep., p. 10). This was about one-half hour before the County employees went in the water (Mosack dep., p. 11).[11]

Cole then called the Coast Guard, asking for authorization to attempt a rescue (Mosack dep., p. 39). The Coast Guard declined, "[w]e're going with the Sheriff . . . we're letting him make the call" (*Id.*).

If allowed, Cole and Mosack could have effected a rescue attempt within 15 minutes of the report of a person off the bridge (Mosack dep., p. 50). The reason Mosack did not make the rescue attempt was that he had previously been told by Haik, "that if we were to get in the water, basically, we could be charged" (Mosack dep., p. 12). Mosack also knew of Haik's policy against non-sheriff personnel attempting to rescue a person who was drowning (*Id.*, p. 14). Mosack's decision not to rescue Beck was consistent with the practice of MSRDT members not risking prosecution (Lamunyon dep., p. 39).

Mr. Krause, not in diving gear, was also on the scene. He spoke to Mosack and Cole who affirmed that they wanted to attempt a rescue (Krause dep., pp. 52-53). Mosack explained, "They told me the same old bullshit. They just told them to stand by" (*Id.*, p. 52). Feeling

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[11] The District Court indicated that equipment problems with the County boat delayed entry into the water (31a). However, there was testimony suggesting that the malfunctions did not occur until attempts to pull the body aboard (Mosack dep., p. 41).

"shrugged off" in this fashion, Krause saw no reason to stay (*Id.*, p. 54).

Mr. LaPoint spoke with Cole and Mosack the day after the drowning. They told him they were concerned about the threat of arrest and that they had been told by Hornkohl that they could not go in (LaPoint dep., pp. 195-196).

6. The District Court Decision

Following extensive briefing and oral argument, the trial judge issued his summary judgment Opinion (22a-50a). While acknowledging that the constitutional violation asserted by Plaintiffs had been recognized in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990) (39a-42a), the Court found the facts in this case insufficient to present a constitutional deprivation (42a-43a). This legal conclusion was based on the court's belief that the divers were not physically prevented or threatened with arrest if they attempted a rescue (42a-43a), that Hornkohl made an "objectively reasonable response", and that he, "reasonably could have concluded that permitting Mosack and Cole to attempt to dive would complicate the better equipped efforts of the Sheriff's diving team" (43a).

Even if the government conduct was unconstitutional, the District Court ruled, this would not allow imposing liability on Haik and Hornkohl (43a-45a). In the court's view, they were entitled to qualified immunity, because their actions did not "violate clearly established

statutory or constitutional rights of which a reasonable person would have known" (*Id.*).

The Court also dismissed the state law claims, finding that Haik and Hornkohl's conduct was not "gross negligence" (46a-47a). Concluding that Mrs. Beck had no constitutional right to avoid being restrained when she sought to rescue her son, the suit by Mrs. Beck individually was dismissed as well (48a-50a).

7. The Court of Appeals Decision

At bottom, the appellate court disagreed with the trial court on one principal point. Although the District Court did not disagree with the existence of a core constitutional right (38a-42a), it found the facts insufficient to establish a violation of that right because, in the court's view, Defendants' conduct was reasonable (43a). The Court of Appeals, viewing the facts in a light favorable to Plaintiff (6a), found the evidence sufficient (8a):

> "The plaintiffs also maintain that Eugene Beck was deprived of his life by an irrational government prohibition against private rescue efforts. This claim might prove to be meritorious, we believe, depending on how a jury ultimately assesses the evidence."

a. The Rulings Not Challenged

The appellate court upheld the dismissal of the state law claims and the action of Sharon Beck (17a-21a). Those rulings are not at issue. The controversy involves the claims of the Estate under 42 U.S.C. § 1983.

The Court of Appeals held that there was no constitutional right to government-provided rescue services, hence there could be no liability for the failure of State actors to rescue (7a-8a). Respondents do not quarrel with that proposition.[12]

With regard to the individual Defendants, the Court of Appeals held that there was no binding Supreme Court or Sixth Circuit precedent existing in 1995 "establishing with particularity that actions of the sort attributable to Sheriff Haik and Chief Hornkohl were unconstitutional" (16a). Accordingly, the Court upheld summary judgment to these Defendants on qualified immunity grounds (15a-16a).[13]

As to the City and County, the Court recognized that the actions in issue were undertaken pursuant to a "policy" or "custom" as those terms are used in § 1983 jurisprudence (10a-15a). Neither government entity

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[12] While the appellate court regarded Respondents' argument as including liability for failure to act, their argument was, and is, considerably more narrow (Brief on Appeal, p. 22):

> " . . . Plaintiffs do *not* claim that the City and County may be held liable for the omissive failure to rescue. Rather, Plaintiffs contend that the policies and practices which affirmatively interfered with an impending private rescue attempt violate due process guarantees of the Fourteenth Amendment under the principles of *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990)."

[13] Qualified immunity is a defense available only to individuals sued under § 1983, not a municipality. *Owen v. City of Independence*, 445 U.S. 622; 100 S.Ct. 1398; 64 L.Ed.2d 673 (1980). Thus, the qualified immunity ruling does not avail Petitioner City.

challenges this ruling. The controversy turns squarely on the issue of whether the decedent had an interest protected by the Constitution upon which the governmental policies infringed.

b. Recognition Of A Constitutional Protection

While recognizing no right to rescue by the State, the Court of Appeals did conclude that, "some constitutional limits do exist on the power of state governments and their political subdivisions to jeopardize human lives through implementation of arbitrary government policies". The Court cited the similar case of *Ross*, where the Seventh Circuit held that "a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative" may be regarded as "arbitrarily den[ying] [the plaintiff's decedent] his fourteenth amendment right to life" (9a). Applying the principle of *Ross* to this case, the Court of Appeals reached the following conclusion:

> " . . . [P]ublic safety officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, for instance, it would certainly be permissible to forbid such an attempt. It would not be irrational, similarly, to prohibit private rescue efforts when a meaningful state-sponsored alternative is available. But *Ross* holds that official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is

not available when it counts – and we are constrained to agree".

ARGUMENT

THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE CONCLUSION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT A POLICY OF THE GOVERNMENTAL DEFENDANTS, WHO HAD NO "RESCUE" TEAMS, TO ARREST AND INCARCERATE SKILLED PRIVATE DIVERS IF THEY ATTEMPTED TO SAVE THE LIFE OF A PERSON IN IMMINENT DANGER OF DROWNING, THEREBY AFFIRMATIVELY PREVENTING RESCUE, IS VIOLATIVE OF FOURTEENTH AMENDMENT PROTECTIONS.

1. The Core Proposition That The Fourteenth Amendment Prohibits Affirmative Government Conduct Which Is Unjustified And Causes Death Or Injury Cannot Be Seriously Questioned.

The declaration of constitutional law announced by the Court of Appeals is captured in a single paragraph (8a-9a), the correctness of which cannot be seriously questioned:

> "As noted above, the Due Process Clause of the Fourteenth Amendment prohibits a state from depriving any person of life, liberty, or property without due process of law. Although its text might suggest that the clause was intended simply to require that fair procedures be followed in any such deprivation by the state, the Supreme Court has recognized that the clause also contains a substantive component

> that protects against 'certain government actions regardless of the fairness of the procedures used to implement them.' *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Courts should be 'reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended,' *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992), but some constitutional limits do exist on the power of state governments and their political subdivisions to jeopardize human lives through implementation of arbitrary governmental policies."

A core interest protected by the due process clause is the right to be free from interference with personal security or bodily integrity. See, *e.g.*, *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990); *Nishyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987); *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996); *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998).

Since the Fourteenth Amendment serves as a constraint on local government, not private individuals, injuries caused solely by a non-governmental agent are ordinarily not actionable under § 1983. *DeShaney v. Winnebago Social Services*, 489 U.S. 189, 195; 109 S.Ct. 998; 103 L.Ed.2d 249, 258-259 (1989). Even so, a city or county may be held liable where governmental officials were "deliberately indifferent" to those with whom officials had established a "special relationship" or custodial control, where a special danger was apparent. See, *e.g.*, *Jackson v. City of Detroit*, 449 Mich. 420, 430; 537 N.W.2d 151 (1995) (suicide of pre-trial detainee); *Farmer v. Brennan*, 511 U.S. ___; 114 S.Ct. 1970; 128 L.Ed.2d 811 (1994) (housing pre-

op transsexual in general prison population); *Doe v. Claiborne County*, 103 F.3d 495, 506-607 (6th Cir. 1996).

In *DeShaney*, this Court considered governmental inaction ("The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them"; 489 U.S. at 203; 109 S.Ct. 889; 103 L.Ed.2d at 263). If Respondents' claims in the case were predicated simply on the inaction of the City and County, the holding in *DeShaney* would presumably dictate a "no constitutional violation" holding.

Here, however, Respondents complain about the express policies of the City and County which affirmatively prevented the rescue which would have taken place without governmental interference. That critical distinction was noted in *DeShaney*, where the Court took pains to point out that, " . . . the State . . . played no part in [the] creation [of the danger], *nor did it do anything to make him more vulnerable . . . [The State] placed [the victim] in no worse position than he would have been if it not acted at all . . .* " (489 U.S. at 201; 103 L.Ed.2d at 262; emphasis supplied). In the wake of *DeShaney*, it has been recognized that affirmative conduct which increases the danger beyond the level it would be without government involvement may be actionable.

It is now held that a "state-created danger" reflecting deliberate indifference (or the like) to the right to personal security is an actionable constitutional violation. See *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062-1066 (6th Cir. 1998); *Kneipp v. Tedder*, 95 F.3d 119, 1205,

1208-1209 (3rd Cir. 1996); *Ross v. United States, supra* and the cases cited therein.

In the final analysis, the Court of Appeals simply recognized that Government is not allowed to cause the death of its citizens by adopting an illegal arrest policy to assure that petty political "turf" is protected at the cost of human life. The principle that the Fourteenth Amendment prohibits irresponsible death-causing conduct of this nature is not fairly debatable.

2. The Fact-Intensive Issue Of Whether The Government Conduct In A Particular Case Was Sufficiently Blameworthy, Unjustified, Or Arbitrary Does Not Warrant Extraordinary Supreme Court Review.

The disagreement between the courts below was not primarily legal in nature. Rather, the lower courts differed in their characterization of the conduct of the government actors (or, more accurately, how reasonable jurors could characterize that conduct). The summary judgment granted to Defendants in the District Court was based on the trial court's view that Petitioner Hornkohl made an "objectively reasonable response" (43a), while the Court of Appeals concluded that jurors could permissibly find the death-causing conduct arbitrary (9a).

Were it critical to the cert-worthiness of the case, the circuit court view is far more tenable. There is no evidence to support the District Court's view that Hornkohl "attempt[ed] to coordinate rescue efforts" (43a); the Sheriff's policy was to provide *no* "rescue efforts", only

"recovery" services, thus there was no "state-sponsored alternative", as the circuit court correctly noted (9a).

Nor is there any basis for the trial court's surmise that "permitting Mosack to attempt to dive would complicate the better equipped efforts of the Sheriff's diving team." Mosack and Cole were on the scene in their dive suits and were prepared to save Beck's life by 10:24, six minutes before the County team was called, sixteen minutes before Haik was notified, and more than forty minutes before the County divers could enter the water. Plainly Mosack and Cole were ready, willing and able to save Beck's life long before the County personnel even got there.

The District Court was also in error in regarding the MSRDT divers as persons who could reasonably be deemed to be "place[d] . . . in jeopardy". By all accounts, the MSRDT divers were well-trained, experienced, and possessed all the relevant certifications.

It is, minimally, permissible for reasonable jurors to share the view that the Government arrest policy was "arbitrary". The policy of arresting rescuers, without regard to whether there was even any crime, is inconsistent with fundamental Fourth Amendment protections against arrests not based on probable cause. It is likewise arbitrary to prohibit all private life-saving, irrespective of the qualifications of the rescuer, immediacy of impending death, or ease of rescue. Ultimately, the policy was that those in danger of drowning should die rather than infringe on the "turf" of bureaucrats whose own underlings would not themselves try to save human life. This policy may fairly be regarded as arbitrary.

At best, the case presents a close question of fact whether the death-causing policy was sufficiently egregious to violate rights secured by the Fourteenth Amendment. Ultimately, the resolution of delicate issues of fact is for the lower courts (in the summary judgment context) and jury (in the trial context). Certiorari should be denied in accord with the observation found in Rule 10:

> "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

3. The Petition Mischaracterizes The Nature Of The Constitutional Right Identified By The Court of Appeals.

In seeking extraordinary Supreme Court review, Petitioners attempt to portray the Court of Appeals Opinion as extraordinary. In doing so, they overstate considerably the nature and import of the decision below.

Seizing on a caption in the Court of Appeals Opinion (8a), Petitioners claim that the appellate court, "recogniz[ed] an affirmative right to unhindered private rescue services" (Petition, pp. 2, 12). Respondents do not claim that the Constitution required any "affirmative" action by the State. Respondents have never contended, and the appellate court did not hold, that the Constitution guarantees the availability of private rescue services. Nor did the appellate court suggest that government must always allow private rescue attempts under all circumstances.

Quite the contrary. The Court of Appeals found no arguable unconstitutionality in the prevention of a rescue attempt by the decedent's mother (17a, fn. 6). The Court took pains to point out that private rescue attempts may permissibly be limited, "[i]f police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt" or "when a meaningful state-sponsored alternative is available" (9a). The notion that the Court of Appeals embraced "an affirmative right to unhindered private rescue attempts" is a straw man of Petitioners' own creation.

The Sixth Circuit characterized the *Ross* decision as one holding that "official action preventing rescue attempts by a volunteer driver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts" (9a). Petitioners suggest that in fact there were "state sponsored rescue services" that were simply "not immediately available" (Petition, p. 12). Likewise, they depict the decision below as one based on "a government decision to await the sheriff's dive team for an underwater rescue effort" (Petition, p. 15).

It is true that the purported "alternative" was, in reality, "not available when it counts." Only in part is this attributable to the fact that no County personnel could be at the scene until after the outermost time for resuscitation had expired. Perhaps more significantly, there were no state-sponsored rescue services ***at all***, since the government policy was not to save human life, or even to allow others to do so, but only to retrieve dead bodies. It is therefore fallacious for Petitioners to argue that the ruling below makes mere delay actionable.

The essence of the appellate court's decision is that the policy here in issue, under the facts of this case, may be viewed by reasonable jurors as so arbitrary and irrational as to cross the "constitutional limits [which] exist on the power of state governments and their political subdivisions to jeopardize human lives through implementation of arbitrary governmental policies" (9a). That ruling is an unremarkable comparison of unique facts to a constitutional right which, at its core, is settled. Petitioners' mischaracterization of the ruling below does not change that truism.

4. The Decision Below Does Not Conflict With Other Decisions.

Petitioners seek certiorari on the ground that the decision below is contrary to those of other circuits (see Petition, pp. 2-3, 15-18). That assertion is inaccurate.

The effort to compare this case to *Hamilton v. Cannon*, 80 F.3d 1525 (11th Cir. 1996), and *Andrews v. Wilkins*, 934 F.2d 1267 (D.C. Cir. 1991) is unavailing. Factually, in each of those cases, there was a government *rescue* service already at the scene or on route at the time of the attempted private intervention [see *Hamilton*, 80 F.3d at 1528; *Andrews*, 934 F.2d at 1269], the very state-sponsored meaningful alternative so conspicuously lacking in this case. Moreover, in *Hamilton*, once the certification of the volunteer was verified, private resuscitation efforts *were* allowed (80 F.3d at 1528). Also, the *Andrews* Court found that case factually distinguishable from *Ross*, a case virtually on "all fours" with this. Thus, the cases are factually different from this, not legally inconsistent with it.

Additionally, the § 1983 issue in both *Hamilton* and *Andrews* focused on the liability of *individual* state actors who, unlike the municipalities in this case, had a "qualified immunity" defense available. Here, in contrast to *Hamilton* and *Andrews*, the municipal corporations, who are not protected by "qualified immunity", have adopted actionable policies. The difference is critical, because the successful qualified immunity defenses in *Hamilton* and *Andrews* presuppose the existence of a constitutional violation, albeit one which was not sufficiently well-established to make individual state actors liable. Those decisions, like that of the District Court here, are consistent with the Court of Appeals' recognition of the existence of a Fourteenth Amendment protection against arbitrary, unjustified, death-causing government policies.

Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983) also provides no support to Petitioners. That case primarily involved allegations of negligence by officers in failing to take sufficient affirmative rescue action.[14] The Court found no Fourteenth Amendment violation when "state officers [attempt to] . . . assist at an accident [and] the attempt fails because of the negligence or even gross negligence of the officers or their supervisors" (715 F.2d at 1206).

Finally, Petitioners are in error in suggesting that the police chase case of *County of Sacramento v. Lewis*, 523 U.S.

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[14] It was argued in *Jackson* that, by directing traffic around the crash site, the officer deterred private rescue. However, there was no identified person, much less one experienced in rescue, who was shown to have been deterred.

833 (1998) embraces a mechanistic Fourteenth Amendment standard which prohibits only "conduct intended to injure" (Petition, p. 13).[15] In *Lewis*, the Court expressly recognized that the scope of Fourteenth Amendment protection necessarily varies with the circumstances (see 523 U.S. at 850-852). The emergency circumstances of a police chase or prison disturbance, which shape limitations on liability in those contexts, do not water down protection against a pre-formulated illegal arrest policy adopted with cold and calculating knowledge of the likelihood of resultant death.

5. Summary

The substantive due process guarantees of the Fourteenth Amendment, the scope of which are context and fact dependent (section 4, *supra*), minimally protect against government policies which arbitrarily, and unjustifiably, subject would-be rescuers to arrest and incarceration, and consign to death those in danger of drowning (section 1, *supra*). Cases involving similar facts do not differ with this analysis, an analysis which does ***not*** confer an unconditionally unhindered right to private rescue (section 3, *supra*). At bottom, the determination whether, factually, the government policies involved in this case violated the Fourteenth Amendment standard is not for this Court (section 2, *supra*). Rather, it is one to be

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[15] Even if that were the standard, the facts of this case allow recovery. A policy which chooses preventable death over "showing up" the government manifests an intent that death occur to avoid the loss of political "face".

made by a properly instructed jury. Certiorari should be denied so that a trial, and an outcome based on the factual merits of the case, can take place.

Respectfully submitted,

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No. 00-1170

IN THE

Supreme Court of the United States

ROBERT C. HORNKOHL, in his official capacity as Director of Public Safety for City of Manistee and CITY OF MANISTEE,

Petitioners,

v.

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT COUNTY OF MANISTEE

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QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment imposes a constitutional duty on the state to provide timely rescue when it restricts private rescue efforts?

PARTIES TO PROCEEDINGS

COUNTY OF MANISTEE AND SHERIFF HAIK

The County of Manistee and its sheriff, Edward Haik, were co-defendants of petitioners in this case. The Court of Appeals affirmed the District Court's grant of summary judgment to Sheriff Haik on grounds of qualified immunity. The Court, however, reversed summary judgment for the County. Although the County has not sought a review of the Court of Appeals' decision, any legal ruling by this Court will affect the outcome of the case against the County.

PETITIONERS

The Petitioners are the City of Manistee and its Director of Public Safety, Robert C. Hornkohl. They were Defendants in this case.

RESPONDENT

Respondent, Galen Beck, is the Personal Representative of the Estate of Eugene Beck and was a Plaintiff in this case.

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STATEMENT OF THE CASE

The County of Manistee incorporates by reference thereto, the Statement of the Case contained in the Brief of the Petitioners.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT IMPOSE A DUTY ON THE STATE TO PROVIDE TIMELY RESCUE WHEN IT RESTRICTS PRIVATE RESCUE EFFORTS.

To prevail in an action brought under 42 U.S.C. § 1983, a plaintiff must show that he or she was deprived of a right secured by the Constitution or laws of the United States by a person acting under the color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). In addition, when a § 1983 claim is asserted against a municipality, the plaintiff must prove that (1) the harm was caused by a constitutional violation and (2) the municipality is responsible for that violation through official municipal policy or unofficial custom or practice. *Collins v. City of Harker Heights, Tex*, 503 U.S. 115, 120-21, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

In this case, Plaintiff's claim is predicated upon the substantive component of the due process clause that protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). Plaintiff's Complaint alleged that Sheriff Haik, acting with final responsibility for the

county, adopted a de facto policy of preventing private rescues of drowning persons while failing to provide meaningful alternatives. (R. 34, Amended Complaint, & 25.) Reduced to its essence, the Plaintiff's Complaint asserts that because the county restricts private rescue efforts, the due process clause imposes a duty on the county to provide rescue services.

This court defined the duty imposed by the due process clause of the Fourteenth Amendment in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 988 (1989). In *DeShaney*, the court held that the state has no duty to provide protective services to its citizens. However, this court recognized a duty to protect in limited circumstances, i.e. when the state takes persons into its custody or restrains them from acting on their own behalf. The court in *DeShaney* explained that when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the due process clause. 489 U.S. at 200. Thus, pursuant to *DeShaney*, some sort of confinement of the injured party — incarceration, institutionalization, or the like — is needed to trigger the affirmative constitutional duty.

In an attempt to avoid the strict limitation imposed on the state's duty to act under *DeShaney*, the Respondents argue that they do not claim a failure to rescue or protect, rather they "complain about the express policies of the city and county which affirmatively prevented the rescue which would have taken place without governmental interference." (Brief in Opposition to Petition for Writ of Certiorari, p. 18.)

The Sixth Circuit agreed with the Respondents and recognized a duty by the government to provide rescue services when it restricts private rescue efforts. The Sixth Circuit found support for its decision in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). In *Ross*, the Complaint alleged that a 12-year-old boy fell off a breakwater into Lake Michigan. Although two nearby scuba diving private citizens offered to help save him, a deputy sheriff, acting pursuant to county policy, ordered them to stop their rescue efforts, threatened to arrest them if they persisted, and even positioned his boat so as to prevent their dive. Twenty minutes after the initial rescuers arrived, the officially-authorized divers recovered the boy's body. Concluding that the plaintiff stated a cognizable § 1983 claim, the Seventh Circuit noted that if the allegations of the Complaint are true, "the County had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative."

The Sixth Circuit and the *Ross* court clearly recognized a broader constitutional duty than that contemplated by *DeShaney*. The Courts and commentators have indicated that the Supreme Court intended that only relationships that created a duty to act are those involving custody and complete restraint of the individual's liberty. An article in the *Harvard Law Review* observed:

> The *Ross* court moved beyond *DeShaney*'s analytical framework to focus on the requirement that government "provide a meaningful alternative" when it "cuts off private sources of rescue." By implicitly reopening the *DeShaney* debate over "special relationships" between the state and an individual that may create an

> obligation for the state to act, the Seventh Circuit indicated its willingness to recognize a sphere of state responsibility larger than that envisioned by *DeShaney*.
>
> The special relationship doctrine delineates situations in which the government becomes obligated to protect an individual or to provide services because of the effect of previous government action. In *DeShaney*, Chief Justice Renquist defined narrowly the range of government action that may give rise to a special relationship. According to him, the only relationships that create a duty to protect are those involving forced physical custody and complete restraint of the individual's liberty; inmates and involuntarily committed psychiatric patients have some guarantees.
>
> *Recent development: Fourteenth Amendment — State Action — Seventh Circuit Recognizes a Broader State's Duty to Act, 104 Harv. L. Rev. 1146 (1991).*

The Fourth Circuit in *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), similarly stated:

> This court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the due process clause. *See, e.g., Rowland*, 41 F.3d at 174-75 (Noting that when the state has not restricted one's ability to care for oneself, the rationale for an affirmative duty falls away); *Piechowicz v. United States*, 885

> F.2d 1207, 1215 (4th Cir. 1989) (Holding that "substantive due process protects the liberty interest only of persons affirmatively restrained by the United States from acting on their own behalf"). *Id.* at 1175.

In this case, since Eugene Beck's liberty was not restrained in any way by the government, the imposition of any duty to provide rescue services ("meaningful alternative") based on alleged interference with private rescue efforts is not supported by the due process clause. At most, the County's alleged interference with or prevention of private rescue may trigger a duty under tort law, but will not create a constitutional duty to provide rescue services.

The Restatement 2d of Torts § 326 "intentionally preventing assistance" provides:

> One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.

Restatement 2d of Torts § 327 "negligently preventing assistance" also states:

> One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by absence of the aid which he has prevented the third person from giving.

Thus, it is clear from the above provisions of the *Restatement Torts* that Plaintiff's claim is the kind of tort law that this court has refused to translate into a due process deprivation. *See Daniels, supra.*

The Sixth Circuit's decision runs counter to this court's admonition that the federal courts should exercise caution and restraint in recognizing new rights under the due process clause. *See Collins, supra.*

Additionally, the Respondents seek to justify the Sixth Circuit's decision under the state-created danger theory. Despite the narrow scope of duty recognized in *DeShaney*, the lower courts have seized upon a comment made in that case as support for carving out an exception based on state-created danger theory. The *DeShaney* court stated in dicta that "while the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them." Based on this dicta, the lower courts have recognized a constitutional duty to protect an individual against private violence in a non-custodial setting if the state takes affirmative action which increases the individual's danger of, or vulnerability to danger. *Kallstrom v. City of Columbus,* 136 F.3d 1055 (6th Cir. 1998).

Several circuits have, however, questioned whether the Supreme Court gave approval to the state-created danger theory in the oft-cited dicta. In *Johnson v. Dallas Independent School District,* 38 F.3d 198 (5th Cir. 1994), the Fifth Circuit stated:

> This court recently noted that no Fifth Circuit case has yet predicated relief on state-created danger theory. *Leffall* [*v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994] also questioned

> whether the Supreme Court voiced support for that theory of constitutional liability . . . *Leffall* suggested that the court was simply placing in context its broader ruling that the state had no affirmative duty to the young client of its welfare department. *Id.* at 201.

The Eighth Circuit in *Dorothy J v. Little Rock School District*, 7 F.2d 729 (8th Cir.) similarly stated:

> We cannot agree with those who have suggested that one comment toward the end of the *DeShaney* opinion — "nor did the state do anything to render him any more vulnerable to [the risk of private violence]." 489 U.S. at 201 — signals the Supreme Court's approval of §1983 liability whenever a state actor has increased the risk of harm from private sources. Such a ruling would make §1983 virtually coterminous with traditional tort law, the very expansion of constitutional tort liability that the Supreme Court has rejected . . . *Id.* at 734.

Even if the state-created danger theory is viable, it is inapplicable to this case because the real affirmative act that placed respondent's decedent in danger was the act of him jumping into the river. The County definitely played no part in causing him to fall into the river.

CONCLUSION

The Sixth Circuit's decision impermissibly expands the concept of substantive due process. The decision reflects a trend in the lower courts of whittling down *DeShaney*'s import. This court should grant certiorari to consider whether to limit the imposition of constitutional duty to instances of custody or involuntary confinement as in *DeShaney* or to extend the duty to any situation in which the state is alleged to have affirmatively acted to restrict private efforts to provide aid, even though the state played no part in creating the danger in the first place. Due to the divergent interpretations of the *DeShaney* decision by the lower courts, it is important for this Court to provide guidance in this important area of constitutional law. Respondent County of Manistee supports and adopts the argument of petitioners.

Respectfully submitted,

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